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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CYNTHIA J. FISHER,

Petitioner,

—v.—

VASSAR COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. What constraints are imposed by this Court upon a reviewing court which has affirmed a finding by the trier of fact of both a prima facie case and pretext in a Title VII and ADEA discrimination case, but where the reviewing court is not persuaded by the district court's further finding that the employer intentionally discriminated against the plaintiff?

2. What weight is to be accorded to the facts that comprise the prima facie case in an employment discrimination suit after the defendant has satisfied the burden of production, but the trier of fact has found the defendant's non-discriminatory explanation to be pretextual?

3. Does an employer's negative reliance on a married woman's pre-employment hiatus of eight years for child-rearing constitute inappropriate sex-stereotyping, establishing illegal discrimination?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner Cynthia J. Fisher prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting in banc, reversing the judgment of the District Court is reported at 114 F. 3d 1332 and is reproduced in the Appendix to this petition at 185a.

The opinion of the panel of the Court of Appeals reversing the judgment of the District Court (reinstated by the in banc court) is reported at 700 F. 3d 1420 and is reproduced in the Appendix at 1a. The opinion and judgment of the District Court ruling in favor of the Petitioner is reported at 852 F. Supp. 1193 and is reproduced in the Appendix at 74a. The order of the Court of Appeals staying the mandate in this case until this Court rules, together with a stipulation and order continuing the order in effect, is reproduced in the Appendix at 326a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (185a) was entered on June 5, 1997. The jurisdiction of this Court is conferred by 28 U.S.C., Sec. 1254 (1).

STATUTES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Sec. 2000 (e) et seq.), the Discrimination in Employment Act (29 U.S.C. Sec. 623 (a)

(1)) and the Equal Pay Act (29 U.S.C. Sec. 206 (d) (1). Relevant portions of these statutes appear in Appendix E at 329a, 330a.

STATEMENT OF THE CASE

Preliminary Statement

Petitioner, a former faculty member in the Biology Department at Vassar, brought suit against the college for violations of Title VII, the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act. After a three week bench trial, the district court, on May 16, 1994, held that petitioner established that 1) she was denied promotion and tenure in violation of Title VII due to her status as a married woman ("sex plus"); 2) she was denied promotion and tenure in violation of ADEA because of her age (53) and 3) she was denied equal pay for equal work. The court further found that she was not discriminated against on "simple sex" grounds as alleged in her complaint.

Accordingly, the court held that petitioner was entitled to recover back-pay and pre-judgment interest on that sum under Title VII, or in the alternative entitled to recover double damages under the Equal Pay Act and the ADEA. When plaintiff chose recovery under ADEA and the Equal Pay Act, the court entered a judgment in her favor on June 30, 1994 in the sum of $626,872.12. The court further ordered her restored to the faculty of the Vassar Biology Department for a period of two years commencing with the fall term of 1994 as an Associate Professor with tenure after which time she was to be evaluated for retention and promotion to Full Professor. By stipulation of the parties, a judgment for attorneys' fees and costs in the sum of $392,205.75 was entered by the district court.

On September 7, 1995, a panel of the Court of Appeals for the Second Circuit affirmed the judgment of the

District Court in favor of plaintiff's prima facie case and claim of pretext but reversed that court's judgment against defendant on the merits on the grounds that its finding of "sex plus" (because plaintiff was a married woman), age (ADEA) and Equal Pay discrimination was "clearly erroneous," and set aside the stipulated judgment of attorneys' fees and costs. Further, the court denied petitioner's cross-appeal on the grounds of "simple sex" discrimination.

Petitioner filed a motion for a rehearing and suggested rehearing in banc. This prompted an amendment by the panel of its opinion but no change in the decision of September 7, 1995. On September 25, 1995, the panel granted petitioner's motion for a stay of the mandate until action by this Court. The stay further provided that the injunction against retaliation imposed by the district court continue until action by this Court on an anticipated Petition for Certiorari.

This stay, now in effect by stipulation of the parties, continues petitioner as an Associate Professor of Biology on the faculty at Vassar where she has been serving since the fall of 1994 by order of the district court.

On February 16, 1996 the full court granted a rehearing, ordered rebriefing of the issues and reargument on June 5, 1996. On June 5, 1997, the full court divided 6 to 5 in a decision which reinstated the panel decision of September 7, 1995, as amended December 14, 1975. The majority of the court below limited its in banc review to resolution of the question "whether a finding of liability under Title VII, supported by a prima facie case and a sustainable finding of pretex is subject to review for clear error"[1]

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[1] Chief Judge Newman in his dissenting opinion wrote: "That issue was never in question, since findings of discrimination had always been subject to 'clear error' review and the Supreme Court had confirmed the availability of such review, prior to this in banc rehearing, in *St. Mary's Honor Center v. Hicks*, 509

The majority wrote at length on the issues of the effect of a prima facie case in a discrimination case and of the role of an appellate court in assessing the fact finder's role in a discrimination case, and further on the burden of proof in discrimination cases both under Title VII and the Age Discrimination in Employment Act (ADEA). In support of this statement as the question to be addressed, the majority then wrote at length on the issue engaged in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) with respect to the weight to be accorded to a prima facie case involving discrimination: How much evidence and what kind of evidence will support a fact finder's determination of discrimination after it has found pretext? Since, under *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 249 (1981) and *St. Mary's* as well, after a showing of a prima facie case and pretext, the fact-finder is permitted to find discrimination based on a finding of mendacity in the defendant's response, the majority had to consider the weight to be accorded to mendacity in a finding of discrimination. It addressed further the question of the burden of proof in discrimination cases both under Title VII and the Age Discrimination in Employment Act (ADEA).

Presented for review of this Court are: 1) the opinion and decision of the panel of the Court of Appeals of the Second Circuit issued on September 7, 1995, as amended December 14, 1995, and 2) the in banc opinion of that court which reaffirmed without review the panel decision of 1995.

U.S. 502, 511 (1993)." (255a,256a) In *St. Mary's*, the Eighth Circuit reversed a fact-finding by a district court of pretext, but not of discrimination in a Title VII case — a result opposite to that in the case at bar. This Court found the circuit court in an error of law and remanded the case to that court for review as to whether the fact-finding of the district court was "clearly erroneous." The majority of the in banc court below wrote 85 pages of opinion on this issue while refusing to consider the error of the panel decision which occasioned the in banc review.

REASONS FOR GRANTING THE WRIT

1. **To Resolve a Conflict Among the Circuits after *Saint Mary's v. Hicks* Concerning the Role of a Reviewing Court in a Suit Alleging Intentional Discrimination Where the Plaintiff Has Established a Prima facie Case, and the Defendant Has Offered a Nondiscriminatory Explanation, the Plaintiff Has Proven that Explanation to be Pretextual, and the Trier of Fact Has Drawn a Finding of Intentional Discrimination.**

This Court granted certiorari in *St. Mary's* "to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of Section 703 (a) (1) of Title VII...the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff" 509 U.S. at 504. The Court held that no such finding was mandated. Rather the Court made clear that the trier of fact was permitted, but not required to make such a finding.

In the four years since *St. Mary's* was handed down, a conflict among the courts of appeal has emerged concerning its meaning and application. This case squarely presents the central unresolved question: What constraints are imposed by this Court upon a reviewing court which has affirmed a finding by the trier of fact of both a prima facie case and pretext, but nonetheless is not persuaded that the employer intentionally discriminated against the plaintiff in violation of Title VII or ADEA?

In this case, a panel of the Court of Appeals for the Second Circuit, having affirmed the trial-court finding of a prima facie case and pretext, reversed that court's judgment for petitioner as "clearly erroneous" because, it said, the

finding of pretext "points nowhere." Discounting that phrase as a mere "figure of speech" and "rhetorical device" that should not be taken literally, the affirming majority of the in banc court (which included two members of the panel), supplied this dilation on the rhetoric: "[w]hat the panel opinion meant by 'points nowhere' was that the inaccuracies in Vassar's statements are explicable by so many equally possible motivations that none emerged with any persuasive force: more particularly, the panel concluded that under the circumstances Vassar's inaccuracies gave little if any support to the inference that Vassar had engaged in discrimination." (32a)

Among the "equally possible motivations" that the in banc majority identified as "non-discriminatory but unbecoming or small-minded" were that Vassar's decision-makers might have indulged in "back-scratching, log-rolling, horsetrading, institutional politics, envy, nepotism, spite, or personal hostility."(14a) In this line of argument the authors indulged in pure speculation. There is no evidence in the record for any of these motivations as a possible alternative to the one found by the trier of fact: the plaintiff had evidenced intentional discrimination.

The in banc majority of the court below thus joined the panel in substituting its own view of the facts for the equally plausible view of the trier of fact in order to hold the district court's explicit finding of intentional discrimination to be clearly erroneous. Such holding violates the constraint imposed on appellate review of fact-finding by this Court's admonition in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 --(1985):

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been

> sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the eveidence, the the fact-finder's choice between them cannot be clearly erroneous."

In allowing the panel to substitute its own view of the facts for that of the trier of fact, without reviewing its decision on the merits, the in banc court has taken a position that is in conflict with holdings of three other circuits and well-reasoned dicta in a fourth. In *EEOC v. Yenkin-Majestic Paint Corp.* 112 F. 3d 831 (6th Cir. 1997), the Court of Appeals for the Sixth Circuit affirmed a finding of discrimination where the trier of fact had found defendant's explanation pretextual and inferred intentional discrimination (on the basis of pregnancy). Noting that the *Anderson* standard "does not entitle a reviewing court to reverse a district court's findings of fact because the reviewing court is convinced it would have decided the case differently," that court of appeals reviewed "the district court's findings of fact for clear error and its conclusions of law de novo." 112 F. 3d at 833. It concluded:

> "The district court's view of the evidence is supported by the record and we cannot reverse that decision even if convinced that we would have assessed the evidence differently had we been sitting as the trier of fact. *Anderson,* 470 U.S. at 573-574...After reviewing the record as a whole, we therefore cannot conclude that the district court's factual findings are clearly erroneous." 112 F. 3d at 834

Similarly, the Court of Appeals for the Third Circuit in *Sheridan v. E.I. Dupont de Nemours and Co.*, 100 F. 3d 1061 (3rd Cir. en banc 1996), *cert den.* 65 U.S. L.W. 3862

(1997), reversed a trial court's order granting judgment to the defendant as a matter of law after finding a prima facie case and pretext, and after a jury had found for the plaintiff, because "[t]he role of determining whether the inference of discrimination is warranted must remain within the province of the jury, because a finding of discrimination is at bottom a determination of intent" 100 F. 3d at 1071.

The court added:

> "This does not mean that the courts in discrimination cases lose their traditional obligation, when faced with a motion for judgment as a matter of law, to review the adequacy of the showing presented to the factfinder to conclude that the reasons are incredible...But once the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination from an unbelievable reason proffered by the employer. "100 F. 3d at 1072.

The Eleventh Circuit, in dicta, has aligned itself with *Sheridan* in its view that

> "If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged. *Combs v. Plantation Patterns*, 106 F. 3d 1519, 1537 (11th Cir. 1997) (citing *Sheridan* at 100 F. 3d 1061, 1069)."

Most recently, the District of Columbia Circuit in *Aka v. Washington Hospital Center*, 116 F. 3d 876 (D.C. Cir. 1997) reversed a district-court order granting summary judgment to a defendant on a claim of intentional discrimination under Title VII and ADEA after plaintiff had shown that the employer's stated reasons for its actions were not credible. The court thus summarized its understanding of a reviewing court's role in a summary judgment case:

> "We must set aside the grant of summary judgment to the employer if the record indicates that the plaintiff presented sufficient evidence to cause a reasonable factfinder to find that the plaintiff had a prima facie case, and that the employer's proffered nondiscriminatory reasons for its actions were not credible; when presented with such evidence, the factfinder may properly find for the plaintiff, and *we have no power to snatch away from the factfinder crucial factual determinations that it is expressly permitted to make.*" 116 F.3d at 881 [emphasis supplied.]

In the case before this Court, to support its dictum that "a finding of pretext, together with the evidence comprising a prima facie case, is *not always* [emphasis supplied] sufficient to sustain an ultimate finding of intentional discrimination," (26a), the court below points to an en banc opinion of the Fifth Circuit in an age-discrimination suit, *Rhodes v. Guiberson Oil Tools*, 75 F. 3d 989,994 (5th Cir. 1996 en banc) The statement in which it finds that telling phrase reads, in full: "To sustain a finding of discrimination, circumstantial evidence must be such as to allow a rational factfinder to make a reasonable inference that age was a determining reason for the employment

decision...In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will *often*, perhaps *usually*, permit a finding of discrimination without additional evidence but *not always.*" [emphasis supplied].

The First and Fifth Circuits and now the Second Circuit have thus held that plaintiff must go beyond proof of the facts underlying a prima facie case and a showing of pretext to prove the defendant's actual motivation in order to prevail on a claim of intentional discrimination.[2] Such holding is in clear conflict with that of the Third, Sixth and District of Columbia Circuits and in dicta by the Eleventh Circuit. The latter hold that, once the plaintiff has established a prima facie case and shown the defendant's explanation to be pretextual, an evidentiary basis has been laid in the record for the factfinder to infer intentional discrimination -- and that the reviewing court may not preclude the factfinder from exercising its prerogative to draw that ultimate inference.

In the instant case, moreover, notice may be taken that the trier of fact found in the very reasons proffered by defendant -- and held to be pretextual by the court below -- explicit evidence in support of its ultimate finding of intentional discrimination. Such evidence went without review in the in banc decision of the court below. In his dissenting opinion, Chief Judge Newman spells this out:

"In this case, the panel decision that the in

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2. The court below cited *Smith v. Stratus Computer, Inc.* 40 F. 3d 11, 16 (1st Cir. 1994), *cert. den.*, 514 U.S. 1108 (1995), (following its earlier interpretation in *Woods v. Friction Materials Inc.* 30 F 3d 255, 261 (1st Cir. 1994) that *St. Mary's* "did not mean to say that such a finding would *always* be permissible...").(15a) The panel decision also cited *U.S. v. Redondo-Lemos*, 27 F. 3d 439, 44 (9th Cir. 1994) and *Worowski v. Nashua Corp.* 31 F 3d 105,109 (2d Cir. 1994) in support of its position. (30a)

> banc majority has permitted to go into effect...did not even purport to deem deficient the evidence underlying either the plaintiff's prima facie case of discrimination or against married women or the finding of pretext. Not one of the District Court's 111 subsidiary findings of fact was ruled unsupported by the evidence. Nor did the panel attempt to marshal evidence in the record opposed to the ultimate finding of discrimination." (105a)

Petitioner submits that this Court should grant the petition for certiorari in order to resolve this conflict among the circuits. Once this Court has clarified the governing legal principles, petitioner prays that the case be remanded to the in banc court for reassessment of the panel decision on the merits in light of those principles.

2. To Clarify the Weight to be Accorded to the Facts that Comprise the Prima facie Case in an Employment Discrimination Suit Once the Presumption of Discrimination Arising from the Prima facie Case Has Been Discharged by the Employer's Explanation and the Trier of Fact Has Found that Explanation to be a Pretext for Discrimination

In a series of cases beginning with *McDonnell Douglas Corp. v. Green* U.S. 792 (1983), this Court has created a carefully balanced evidentiary framework to be used in discrimination cases. This framework is designed to afford an opportunity to plaintiffs claiming intentional discrimination to learn the reasons for the employer's action prior to proving intent while safeguarding employers against frivolous claims. Under these precedents only those plaintiffs can prevail who can show that the employer's explanation is mendacious.

McDonnell Douglas, 411 U.S. at 802. As this Court made clear in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981):

> "[t]he prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection...Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."

Moreover, the burden placed on the defendant is not a burden of proof, but rather a burden of production. The *Burdine* court observed:

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons...It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55.

The Court went on to reject as unlikely the court of appeals' fear that "[i]f an employer need only *articulate*--not prove -- a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his

actions." 450 U.S. at 257-58. And in *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983), this Court spelled out the remaining requirements of the evidentiary framework after the defendant had articulated nondiscriminatory reasons for its action:

> "[w]hen the defendant fails to persuade the trial court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell Douglas-Burdine* presumption 'drops from the case,'[and] 'the factual inquiry proceeds to a new level of specificity.'" *Aikens*, 460 U.S. at 715, quoting *Burdine*, 450 U.S. at 255 n.10.

This Court resolved the conflict among the circuits in *St. Mary's* by making clear that once the defendant has produced "*evidence* (whether ultimately persuasive or not) of non-discriminatory reasons" 509 U.S. at 509, the burden of persuasion that remains with the plaintiff is not satisfied by a demonstration that the employer's reason was false. The Court observed "[n]othing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." 509 U.S. at 514-15. Instead, "proving the employer's reason was false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." 509 U.S. at 517.

The *St. Mary's* Court carefully refrained from

requiring the plaintiff to produce additional evidence of intentional discrimination. Rather, it stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." 509 U.S. at 511.

The approach taken in this case by the court below does not respect the careful balance established by this Court in these cases. Instead, the court below seeks several circuitous ways around this Court's teaching. First, it minimizes the significance of the prima facie case by invoking this Court's characterization of the plaintiff's burden of establishing the prima facie case as "not onerous" (192a, quoting *Burdine*, 450 U.S. at 253) and "minimal" (192-193a, quoting *St. Mary's* 509 U.S. at 506). Such argument of the relative ease of discharging the burden of making out a prima facie case by the court below does not, however, diminish the significance of this Court's recognition, noted above, that the prima facie case "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, U.S. 450 at 254.

Second, the court below exaggerates the importance given to the nondiscriminatory reasons articulated by the employer. While the production of those reasons -- whatever they may be -- has the effect of discharging the presumption of discrimination, they may not in themselves refute the facts that make up the prima facie case. The court below holds, nonetheless, that the defendant need not refute those facts; in its view, the "limited prima facie case" (195a) required in Title VII and ADEA cases "does not necessarily have much force in showing discrimination."(*id*). Indeed, in its view,

> "[D]iscrimination cases differ from most areas of the law in that under the *McDonnell*

> *Douglas* burden-shifting framework a plaintiff's satisfaction of the minimal requirements of the prima facie case does not necessarily mean, even if the elements of the prima facie case go unchallenged, that the plaintiff will ultimately have sufficient evidence to support a verdict on each element that plaintiff must ultimately prove to win the case." (197a)

Third, the court below seeks to diminish the effect of the factfinder's determination that the employer's proffered reasons are not only pretextual but are also a pretext for discrimination. It observes that:

> "[o]nce the trial has moved to the stage at which the plaintiff must prove discrimination by a preponderance of the evidence, a defendant's false statements are nothing more than pieces of circumstantial evidence, which may be employed, as in other cases of this kind, to reveal the speaker's state of mind." (200a)

The court below then goes on to conclude:

> "We have seen that, while a prima facie case and a finding of pretext may in some cases powerfully show discrimination, neither one gives plaintiff much support in discharging his obligation to prove that he was a victim of discrimination. Indeed, the combined effect of both may have little capacity to prove what the plaintiff has the ultimate burden of proving. Thus, a finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an

ultimate finding of discrimination." (200a)

To the extent that the final sentence of this passage merely rephrases this Court's holding in *St. Mary's* that a finding of pretext does not compel a judgment for plaintiff, it is unremarkable. In context, however, the passage goes far beyond *St. Mary's* to undermine the factfinder's prerogative of basing the ultimate finding of discrimination upon the evidentiary basis. As specified by *St. Mary's*, the factfinder may properly reckon its disbelief of the defendant's reasons, "particularly if disbelief is accompanied by a suspicion of mendacity," 509 U.S. at 511, along with the elements of the prima facie case. Rather than accepting the factfinder's prerogative, the court below would require more than this Court asked in *St. Mary's*; its alternative formulation is that:

> "a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for discrimination: either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction -- or both." (17a,18a)

In reviewing the legal sufficiency of the finding of discrimination in accordance with this restrictive standard, the court below undertook to discount the district court's finding of pretext, which the panel had affirmed, by doing what the court of appeals in *Burdine* had feared an employer might do: "compose fictitious, but legitimate, reasons for his actions." 450 U.S. at 258. The court then modified its order granting rehearing in banc "to provide that the in banc hearing is limited to the force and effect of a pretext finding, taken together with a prima facie case, in considering on appeal whether or not an ultimate finding of discrimination is clearly erroneous under Fed. R. Civ. P. 52 (a)." (220a-221a). It concluded:

> "Because our ruling on that question reaffirms the applicability of the rule employed by the panel -- that no special weight is given to the evidence that supports the prima facie case and pretext in conducting clear error review of an ultimate finding of discrimination -- we have no reason to suppose that the panel would now alter its views on the application of that rule to the district court's findings. Accordingly there is no need to remand to the panel for renewed consideration in light of the in banc court's opinion."

In so ruling the in banc majority scanted a trial record in which the finder of fact did explicitly find evidence of discrimination and found it, moreover, in defendant's mendacious proffered pretext (see *infra* for one instance). The panel and the affirming majority of the court below had to misread that record to state and leave standing the statement: "...points nowhere, as the district court's own opinion suggests." (32a)

Petitioner submits that this Court should grant the petition for certiorari in order to clarify the legal principles that govern the weight to be accorded to the elements of the prima facie case when combined with a showing of pretext and a suspicion of mendacity. This Court should remand the matter to the in banc court for reconsideration of its ruling in light of those principles.

3. The Panel's Conclusion, Left Standing with the Explanation by the Court below that the District Court's Finding of Pretext "Points Nowhere," Ignores the Teaching of this Court in *Price Waterhouse v. Hopkins* that the Use of Sex Stereotypes May Point Toward

Discriminatory Intent and Requires, therefore, Review and Correction by this Court

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), 490 U.S. 228 (1989) this Court recognized the relevance of evidence of sex stereotyping to a claim of intentional discrimination based on sex. Writing for himself and Justices Marshall, Blackmun and Stevens, Justice Brennan stated:

> "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for 'in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes' *Los Angeles Dep't. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978) quoting *Sprogis v. United Airlines*, Inc. 444 F. 2d 1194, 1198 (7th Cir. 1971)." 490 U.S. at 251.

Justice O'Connor, concurring, did not question the plurality's discussion of sex stereotyping, and her own prior analysis in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-725 (1981) of the standard to be applied in measuring sex discrimination claims under the equal protection clause is consistent with the plurality's statement:

> "[T]he test for determining the validity of a gender-based classification...must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory

> objective itself reflects archaic and stereotypic notions." 458 U.S. at 724-25

Finally, even the three dissenters in *Price Waterhouse*, Chief Justice Rehnquist, Justices Kennedy and Scalia, while pointing out that "Title VII creates no independent cause of action for sex stereotyping," nonetheless agreed that:

> "Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." 490 U.S. at 294

Petitioner claimed, and the district court found, that defendant's frequent references to the "hiatus" in her academic career -- the fact that she had spent eight years at home with her husband and her children after having completed her Zoology Ph.D. and her post-graduate training in 1965, and prior to having resumed her academic career at Marist College in 1974, then moving to Vassar in 1977 -- was evidence that defendant had allowed a stereotype against married women in the hard sciences in academia to influence its judgment of her qualifications for tenure. The district court had found that:

> "The persistent fixation of the Biology Department's senior faculty on a married woman's pre-Vassar family choices reflects the acceptance of a stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist and, therefore, is not one despite much evidence to the contrary." (128a)

The panel agreed that "[t]he evidence supports an inference that Dr. Fisher's eight-year absence from academia hurt her chances for tenure." (58a) The panel failed, however, to connect this inference to the sex stereotype

against married women in the hard sciences that the district court had found relevant.[3] Instead, it sought to explain the implications of the evidence by reference to the hypothetical employment policy of an un-specified employer concerning periods of absence in the workplace:

> "A policy may discriminate between those employees who take off long periods of time in order to raise children and those who either do not have children or are able to raise them without an appreciable career interruption. That is not inherently sex specific and does not give rise to a claim under Title VII." (58a-59a)

The panel went on to require petitioner, in order to prove intentional discrimination, to compare herself with married men who took off equal periods of time from their careers (58a). While betraying, thus, its double blindness to the sex stereotype against married women -- especially in the hard sciences, as established in this case by un-rebutted expert testimony[4] -- the panel has ignored this Court's ruling in *Price Waterhouse*.

As Judge Calabresi pointed out in his concurring and

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[3] The chairman of the Biology Department testified at trial that petitioner's "being 10 years away from active involvement in biological research [this "hiatus" completed 11 years before the 1985 tenure review] represented a huge gap in her knowledge" and was presently "relevant" in 1985 to her promotion and tenure. The district court considered his testimony to that effect "direct" evidence and a "principal factor" in showing that married-woman stereotype barred petitioner's advancement. The panel decision faulted the district court in this holding on the ground that a "relevant" factor is not the same thing as a "principal" factor. (41a)

[4] The trial court had found it significant with regard to discrimination against married women, based upon expert testimony and an admission by the Dean, that no married woman had ever achieved tenure at Vassar in the hard sciences. (128a)

dissenting opinion, whether a sex stereotype influenced Vassar's decision not to grant petitioner tenure is directly relevant to the weight to be given to the district court's finding of pretext as well as to the question of "whether taking the plaintiff's and the defendant's evidence as whole, Judge Motley's finding of discrimination is clearly erroneous" (257a). He went on to explain:

> "I find this question close, in part because the strength of the suggestion of discrimination raised by Vassar's lie is less easily gauged than in many cases. Vassar's pretext could be viewed as just a lie, or as a lie that derives from a discriminatory stereotype. Vassar incorrectly claimed, for example, that Fisher did not spend enough time in the lab. Was this a simple lie or was it based on a stereotypical view that married women with children spend less time in the lab?" (251a, 252a)

Judge Jacobs, the author of the panel opinion, wrote a separate concurring opinion to the in banc decision in which he undertook to rebut some of the arguments put forward by the five dissenting judges. Responding to Judge Calabresi's point, quoted above, Judge Jacobs concedes that Vassar's assertion that Fisher spent less time in the lab "could" be premised on the stereotypical view that Calabresi identified. He went on to show once again, however, that he did not fully appreciate the relevance of his concession to the weight that should be accorded to the district court's finding of pretext:

> "Judge Calabresi's opinion asks whether Vassar's assertion that Fisher spent insufficient time in the laboratory could be premised on a stereotypical view that married women with children spend less time in the lab...It could --

> if there were any evidence that Vassar's decisionmakers were in the grip of such a stereotype. But marriage would seem to be beside the point; the pretext finding that Judge Calabresi posits could point as well to discrimination based on a general stereotype of women as care-givers, and directed against all working women, or (perhaps) against all working mothers." (227a, 228a)

To this explanation Judge Calabresi responded in a footnote to the effect that, even assuming arguendo that Judge Jacobs is correct that such evidence is lacking --

> "At most, however, that would raise an interesting question. In determining whether to give more weight to a pretextual answer because it is linked to an offensive stereotype, must one show that the defendant who gave the false answer is 'in the grip of such a stereotype,' or is it enough simply to show that the offensive stereotype is plausible? Obviously, if one can show the former, the pretext points more strongly in the direction of discrimination than if one can only show the latter. But I am inclined to think that even a bare finding that a false answer is plausibly connected to an offensive stereotype makes that false answer considerably more probative of discrimination than a pretextual answer that is unconnected to such a stereotype. This means that the only thing needed to raise a doubt as to whether something was a simple lie or was based instead on a stereotypical view is that the pretext be plausibly connected to the stereotype. Judge Jacobs concedes that

such a plausible connection exists in this case, and that is all my argument requires."(252a, n. 12)

Moreover, as noted above, the trier of fact found that Vassar's decisionmakers had, indeed, accepted the stereotype "that a married woman with an active and on-going family life cannot be a productive scientist and, therefore, is not one despite much evidence to the contrary." (128a)

Finally, Judge Jacobs agreed with Judge Newman that "consideration of such a hiatus, absent an adverse impact on a person's current attainments, unfairly burdens a 'working woman.'" He went on to point out "[h]owever, 'working women' is a category that takes in all women in the workplace and therefore bears on simple sex discrimination, rather than sex-plus-marriage" and concluded "[a]s it happens, however, the district court rejected Dr. Fisher's claim of sex discrimination as baseless." (51a). Judge Jacobs, notably, refrained from acknowledging in this connection that the panel had responded to petitioner's cross-appeal from this part of the judgment by reversing the district court on its legal basis for refusing to find simple-sex discrimination. That claim remains open for re-evaluation should this petition be granted and the case be remanded for further consideration.

If a "smoking gun" is required to establish discriminatory intent, this inconclusive colloquy between two members of the in banc court on the nature and significance of the stereotype that has disqualified so many married women from a career in the hard sciences surely satisfies the principle that where there is smoke a gun has been fired, precisely as the trier of fact found in this case.

Petitioner submits that this Court should grant this petition for certiorari in order to instruct the court below on the relevance of the sexual stereotyping to a finding of pretext

and the assessment of whether a finding of intentional discrimination is clearly erroneous. This Court should remand the matter to the in banc court for reconsideration by that court of its ruling in the light of that clarification.

RELIEF REQUESTED

Petitioner requests that this Court address the three points presented in this petition, clarify the legal principles at issue, and remand the matter to the in banc court for its reconsideration of the merits of petitioner's cross-appeal from the denial of her claim of simple sex discrimination under Title VII, as well as the merits of respondent's appeal from the district court's judgment of petitioner's claim of sex-plus discrimination under Title VII, the ADEA, and the Equal Pay Act, consistent with this Court's interpretation of the law.

CONCLUSION

For the foregoing reasons, petitioner requests this Court to issue the Writ of Certiorari to review the decision of the Court of Appeals of the Second Circuit.

Respectfully submitted,

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September 2, 1997

APPENDIX

[AMENDED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1179, 1303, 2275—August Term 1994

(Argued: March 20, 1995 Decided: September 7, 1995)

Amended December 14, 1995

Docket Nos. 94-7737, 94-7785, 94-9125

CYNTHIA J. FISHER,

Plaintiff-Appellee-Cross-Appellant,

—v.—

VASSAR COLLEGE,

Defendant-Appellant-Cross-Appellee.

Before:

MCLAUGHLIN, JACOBS, *Circuit Judges,*
and KAUFMAN, *Senior District Judge.*[1]

Appeal by defendant Vassar College from final judgments of the United States District Court for the South-

[1] Honorable Frank A. Kaufman, of the United States District Court for the District of Maryland, sitting by designation.

ern District of New York (Motley, *J.*). Following a bench trial, the district court found that, in denying plaintiff tenure, defendant had discriminated against her (a) by reason of her sex in violation of Title VII of the Civil Rights Act of 1964 and (b) by reason of her age in violation of the Age Discrimination in Employment Act. The district court further found that defendant had discriminated against plaintiff in setting her salary below that of her male colleagues in violation of the Equal Pay Act. The district court awarded plaintiff $626,872.12 in damages plus $392,205.75 in attorneys' fees and ordered defendant to reinstate plaintiff as a professor for a minimum of two years. Plaintiff's cross-appeal seeks a modification of the terms of her reinstatement order, and challenges the district court's dismissal on an issue that might have furnished an alternative ground for sex-discrimination liability.

We affirm in part and reverse in part and direct the district court to vacate its judgments and dismiss plaintiff's lawsuit.

MAURICE F. CURRAN, Mount Kisco, NY (James P. Drohan, Daniel Petigrow, Anderson, Banks, Curran & Donoghue, Mount Kisco, NY, on the brief) *for Defendant-Appellant-Cross-Appellee.*

ELEANOR JACKSON PIEL, New York, NY (Herma Hill Kay, Berkeley, CA, on the brief) *for Appellee-Cross-Appellant.*

(Judith E. Kurtz, San Francisco, CA, Martha S. West, Davis, CA, *for* Amici Curiae *Equal Rights Advocates and NOW Legal Defense and Education Fund.*)

(Michael A. Olivas, Helen D. Irvin, Ann H. Franke, Washington D.C., *for* Amicus Curiae *American Association of University Professors.*)

(James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Samuel A. Marcosson, Attorney, Washington, D.C., *for* Amicus Curiae *Equal Employment Opportunity Commission.*)

JACOBS, *Circuit Judge*:

Following a three week bench trial, the United States District Court for the Southern District of New York (Motley, *J.*) found that Vassar College discriminated against plaintiff Cynthia J. Fisher in 1985 when it denied her tenure as a professor in its biology department (a) by reason of her sex together with her status as a married woman, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and (b) by reason of her age, in violation of the Age Discrimination in Employment Act ("ADEA"). The district court rejected, however, plaintiff's claim of "simple" sex discrimination based solely on her status as a woman. The district court further found and concluded that Vassar's discrimination against

Fisher violated provisions of the Equal Pay Act. Based on these findings, recorded in a detailed opinion, *see Fisher v. Vassar College*, 852 F. Supp. 1193 (S.D.N.Y 1994), the district court directed Vassar to pay an aggregate money judgment of $626,872.12 together with Fisher's attorneys' fees. The judgment also ordered that Fisher be restored to the Vassar faculty for a period of two years, after which time she again would be evaluated by the school for the purpose of determining whether she was qualified for promotion to full professor with tenure.

Vassar challenges the findings relied on by the district court to support judgment against Vassar under Title VII, the ADEA and the Equal Pay Act, and seeks to vacate the district court's award of attorneys' fees. In a cross-appeal, Fisher argues that the district court erred in (1) finding that plaintiff had failed to prove a case of "simple" sex discrimination in violation of Title VII, and (2) failing to order her reinstatement with full tenure without further tenure-track service or further tenure evaluation.

The trial focused on two issues: Fisher's qualifications for tenure and Vassar's history of tenure decisions involving candidates who were married women. As to her qualifications for tenure, Fisher sponsored testimony by several experts in the field of biology and voluminous documentation comparing her teaching and scholarly record to other Vassar biology professors who had been considered for tenure. As to Vassar's treatment of married women candidates for tenure, Fisher presented (*inter alia*) numbers purporting to demonstrate that no married woman on the Vassar faculty had been granted tenure in the "hard" sciences in the three decades preceding plaintiff's 1985 denial of tenure; the testimony of

former Vassar biology professors relating the events of their careers at Vassar and expressing their belief that the Vassar biology department discriminated against married women; and the testimony of a sociologist, describing the discrimination generally experienced by married women in the sciences and opining that Vassar had discriminated against plaintiff. Finally, Fisher served as her own chief witness, recounting her experiences in the Vassar biology department and related anecdotes.

Vassar defended on two fronts: Fisher's lack of qualifications for a tenured professorship in Vassar's biology department, and the absence of any record of discrimination by Vassar on the basis of sex or on the basis of sex conjoined with marital status. Most of the testimony offered by Vassar came from current and former Vassar biology professors and administrators, who described the procedures used in the Vassar tenure review process generally and the care with which Vassar proceeded in Fisher's particular case. Defendant also sought to present its own data concerning Vassar's school-wide record of promoting married women. The district court refused to admit these statistics into evidence.

The district court's opinion rejected plaintiff's claim of "simple" sex discrimination, but found that, as a *married* woman, plaintiff had established a claim of "sex plus" discrimination in violation of Title VII of the Equal Rights Act ("Title VII"). After a detailed critique of the department's report recommending against tenure for Fisher, the district court concluded that the department's assessment of her qualifications was biased and that plaintiff had met all the recognized requirements for tenure in the biology department:

> The court . . . finds that the termination of plaintiff's employment resulted not from any inadequacy of her performance or qualifications or service, but from the pretextual and bad faith evaluation by Vassar of her qualifications . . .

Fisher, 852 F. Supp. at 1218. In arriving at its conclusions, the court credited plaintiff's theory that Vassar had a practice of discriminating against married women employed in the "hard" sciences, took note of plaintiff's eight-year absence from her career to raise a family, and addressed the contentious issue of whether Title VII permits Vassar to weigh that fact against her in its tenure decision:

> At trial plaintiff presented evidence in support of her claim that she was discriminated against because of her marital status: 1) evidence distinguishing between departments in the "hard" sciences (including the Mathematics, Physics, Chemistry, Geology, Biology and Computer Science departments) and the departments in the rest of the College; 2) evidence that traditionally the "hard" sciences faculties have been composed of men (married and single) and women (single only); 3) evidence that although married women constituted 52 percent of the women in science nationally, no married women had ever received tenure in the "hard" sciences at Vassar. Plaintiff claims that it was her decision to be a wife, mother and a scientist before seeking tenure at Vassar that resulted in the denial of tenure application.
>
> Part of plaintiff's claim of sex discrimination due to her marital status involves the fact that plaintiff left formal academia for approximately eight years

> in order to raise a family. In 1965, when plaintiff left academia, marriage and family went hand in hand for women, especially for women of plaintiff's race and class. Prior to the 1970's Women's Movement and social advances that have permitted women more freedom in shaping their private and professional lives, women who were of plaintiff's race and class rarely had children out of wedlock. Likewise, women of plaintiff's race and class who were married almost always had children. In other words, raising a family was an assumed aspect of marriage.
>
> Subsequent to her parental leave, plaintiff returned to academia and spent nine years in academia before coming up for tenure. She claims that despite her qualifications and her progress in becoming current in her field, her absence from academia was held against her as an insurmountable barrier.

Fisher, 852 F. Supp. at 1225-26 (footnotes omitted). The court also found in favor of Fisher on her claim of age discrimination in violation of the ADEA, and on her claim of salary discrimination in violation of the Equal Pay Act. The district court rejected plaintiff's claim for compensation based on Vassar's alleged "retaliation" against her for the filing of this lawsuit.

Following a thorough survey of the record, we reverse the liability judgment against Vassar because our conviction that a mistake has been committed is definite and firm. We further vacate the district court's order and judgment of attorneys' fees. We affirm, however, the district court's conclusion that plaintiff had failed to establish a claim of "simple" sex discrimination. We do

not reach Fisher's cross-appeal concerning the terms of her reappointment to the Vassar faculty.

BACKGROUND

The Candidate's Career. Cynthia J. Fisher was born in 1932. She was honored in the Westinghouse national science competition as a 17-year-old high school senior, and received a bachelor's degree in zoology from the University of Wisconsin in 1955. She pursued graduate studies in zoology at Rutgers State University, earning a master's degree in 1957 and a Ph.D in 1963, and stayed on at Rutgers for two more years doing post-doctoral work.

Plaintiff married Armen G. Fisher on a date not specified in the record; they adopted the first of their two daughters in 1965 and the second in 1968. From 1966 through 1974, Fisher devoted the bulk of her energy to raising her children and did no work outside her home. The district court found that this eight-year break in plaintiff's career was "not a total hiatus". *Fisher*, 852 F. Supp. at 1216. In her appellate brief, plaintiff claims that throughout this time she "kept in touch with her field by reading journals and keeping abreast of work in the field of biology." Brief of Appellee at 3. In 1974 she took a part-time position at Marist College in Poughkeepsie, New York, and returned to teaching.

Vassar hired Fisher as a visiting assistant professor in biology in 1977, at first on a part-time basis and eventually on a full-time basis. She remained at Vassar as an assistant professor and was offered a tenure-track position in 1980. In 1982, plaintiff was reappointed for a three year term with a promise of tenure review in 1985,

notwithstanding a mixed departmental evaluation in which two of the then four senior members of the biology department concluded that plaintiff did "not meet the criterion of high quality teaching and barely meets the criterion of research promise". Joint Exhibits ("JE") at 197e.

The Tenure Process. Tenure review at Vassar proceeds in several steps. First, the candidate's credentials are presented to the department. After a review, the department forwards its recommendation to the dean of the college and to the college-wide Faculty Appointments and Salary Committee (the "Appointments Committee"). The dean and the Appointments Committee also receive input on the candidate's scholarly achievement from outside evaluators. Based on this information, the dean and Appointments Committee make their recommendation to the president of the college who, in turn, submits a recommendation to the Board of Trustees. The candidate has the option of appealing a negative decision to the Faculty Appeals Committee.

Vassar's review of Fisher's candidacy took place over the course of the 1984-85 academic year. Fisher submitted a proposed list of outside evaluators in October 1984. On March 29, 1985, the biology department issued a unanimous and unfavorable recommendation. JE at 216-229. The report evaluated plaintiff's qualifications in four categories that the department deemed relevant: scholarship, teaching, service and leadership, and concluded that Fisher failed to exhibit the required "outstanding quality" in any of the four areas. JE at 216. It therefore "recommend[ed] unanimously against promotion." JE at 229.

The Findings of the Tenure Report. The biology department's report surveyed plaintiff's numerous publications and grant proposals, but found that plaintiff's record posed

> serious questions about her independence as a scholar, about the depth of her mastery of the field in which she is working, and about whether or not she is seriously engaged in an effort that will continue to be productive . . . .

JE at 221.

The report's analysis of plaintiff's teaching ability included a review of her student evaluations, which (according to the report) reflected "consistent problems with clarity and her ability to illuminate difficult material" but were otherwise generally positive. JE at 223. The report further noted that plaintiff had a "poor" record in supervising independent research. JE at 225. Finally, the report voiced a "serious dissatisfaction [with plaintiff's] failure to introduce a 300-level course of her own design in an area of interest to herself." JE at 225. The department was "unanimous in the firm belief that Ms. Fisher does not meet the criterion for high quality teaching at Vassar College." JE at 226.

The report briefly reviewed plaintiff's service to the department and to the college as a member of the Safety Committee, as an advisor to majors in the department, and in helping secure various grants used to purchase additional equipment for the department. The report further noted that plaintiff had served the college-wide community as a member of the Academic Panel and the Library Committee as well as various other committees. Despite these contributions, the report concluded that "[o]verall [the department was] not satisfied by Ms.

Fisher's service to the department and feel that while her service to the college may be adequate it is in no way outstanding . . . [and] not of sufficiently high quality for promotion." JE at 227.

Leadership was the final formal criterion discussed in the report. Here, the department found her to be "a great disappointment." JE at 227. The report stated:

> We find no evidence of leadership in curricular matters either inside or outside of the department, and as best we can judge her interest is just not engaged by the subject. Part of Ms. Fisher's problem seems to be that she has difficulty in establishing straightforward, open, trusting, collegial relationships with others in the department. Another part of the problem is that she just doesn't often speak her mind on matters of departmental concern and thus falls short as an intellectually stimulating colleague and contributor to departmental policy-making. Her deferential attitude has been a continuing source of frustration. We also find that we cannot imagine her assuming the responsibilities of the department chairmanship. This is something we believe every tenured member of the department ought to be able to do. Neither do we feel we could nominate her to serve on major faculty committees of the College. None of us would recommend her as director of our introductory biology course.

JE at 227.

As to Fisher's area of expertise—developmental biology—the Report concluded that her work did not fill a departmental need:

> [She] offers to our curriculum little that is unique. Her areas of expertise are already to be found in the tenured ranks of the department. Ms. Fisher's failure to introduce a[n] advanced level course of her own design exacerbates the situation. In effect she has failed to make a unique curricular contribution and to carve out her own niche as every other member of our faculty has done.

JE at 228. The review of the candidate's educational and professional history discusses her hiatus from academia:

> Ms. Fisher began her scientific career in the usual way and with an acceptable, though not outstanding record of publication. However, beginning in 1965, at the end of her postdoctoral studies, she devoted, by her own report, nine years (1965-1974) entirely to her family and to her personal life. As far as we can tell from materials submitted by her, Ms. Fisher attended no meetings, belonged to no societies, and ceased all communication with colleagues in the scientific community.

JE at 217.[2] The report was signed by the five then-tenured members of the Vassar biology department, three men and two women. Plaintiff was told of the department's recommendation by department chairman

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[2] Testimony at trial suggested that plaintiff herself invited attention to her hiatus. H. Patrick Sullivan, who served as dean of the college during plaintiff's tenure review process, testified as follows:

> Q: What is your understanding with regard to that statement [referring to the department's reference to plaintiff's hiatus] as expressed on the first paragraph of page 2 as to who injected that as a factor in the tenure approval process?
>
> A: I think the telling phrase is "by her own report." My sense of that is that it was a matter which Ms. Fisher in particular had cited in speaking of her accomplishments.

Transcript at 2131.

Leathem Mehaffey in a 12-minute meeting on March 29, 1985. In keeping with Vassar policy, the report was confidential and plaintiff did not actually read it until she obtained it through discovery in this lawsuit.

Consideration of the Report. Dean H. Patrick Sullivan met with members of the Appointments Committee on April 19, 1985 to exchange their initial reactions to the biology department report. According to notes taken at that meeting, two of the Committee's five members expressed an inclination to vote against tenure, one was in favor and two expressed no view. Dean Sullivan voted tentatively against tenure. JE at 290, Transcript ("T") at 2104-05.

Dean Sullivan and the Committee met with Vassar's president on April 30, 1985. Again, two Committee members and the dean voted against tenure, one member voted in favor, and two abstained. According to Dean Sullivan's notes of the meeting, the president made an observation concerning "overkill on dept's part". JE at 290. Later, the district court held up this observation as a "virtual smoking gun" evidencing the college's policy of discrimination. *Fisher*, 852 F. Supp. at 1229.

On May 3, 1985, the Appointments Committee and Dean Sullivan met with the senior members of the biology department to discuss Fisher's departmental recommendation, the outside evaluations and student comments. Notes taken at that meeting by one Committee member attributed to the biology department the view that "she is *out of date*—out of field for 10 years". JE at 288. This statement too was later cited by the district court as evidence of the college's discrimination. The evaluations offered by the three outside scholars and considered at this meeting were markedly more positive

than the departmental appraisal. For example, a professor at the University of Washington praised plaintiff's scholarly work:

> I have never been provided with so much information about a candidate for promotion, nor have I completed a review with as much appreciation for the value of the candidate as a teacher, scientist and scholar, leader and human being as I have gained in reading the information about Dr. Cynthia Fisher. Her enthusiasm, dedication and energy for her profession comes through all of her carefully and articulately written documents.

Letter of Karen A. Holbrook to H. Patrick Sullivan, March 5, 1985, JE at 277. *See also* Letter of Dennis R. Roop to Patrick Sullivan, April 18, 1985, JE at 280; Letter of Paul F. Goetinck to H. Patrick Sullivan, March 13, 1985, JE at 282.

After this meeting, the biology department twice sent letters to Dean Sullivan and other participants in the tenure review process. The letters reaffirmed the department's negative recommendation, and accused Fisher of distorting her record during the tenure review process. In the letter dated May 6, 1985, the department commented:

> We were and continue to be deeply disturbed by the fragmentary information revealed to us during the meeting from documents supplied by Ms. Fisher to you. We hope that we were able to convince you that much of that material was self-serving, distorted, and inaccurate. Now that distortions have been revealed in those documents you discussed with us, we hope you will allow us to assist you in evaluating any other information that you may have

> before it is accepted for fact and used in your decisions.

JE at 233.

At a final meeting on May 16, 1985, all five members of the Appointments Committee voted against tenure, as did Dean Sullivan and the president of the college.[3] Acting upon this recommendation, the Vassar Board of Trustees denied Fisher tenure. Two other candidates in the biology department were up for tenure in the same round of evaluations; one man (Edward Tucker) was denied tenure, and one woman (Pinina Norrod) achieved it.

Fisher appealed to the Faculty Appeals Committee, which in due course rejected her challenge; she then lodged a complaint with Vassar's affirmative action officer, asserting that she was a victim of discrimination against married women. On July 26, 1985, Fisher filed a claim of discrimination with the New York Division of Human Rights. In this claim, plaintiff charged Vassar "with denying me equal terms, conditions, and privileges of employment and dismissing me because of my age, sex, and marital status, which is a violation of the New York State Human Rights Law." Supplemental Joint Appendix at 1. Plaintiff left Vassar at the conclusion of her contract in May 1986.

Aftermath and Litigation. Fisher was subsequently hired by Bard College in a half-time position as adjunct faculty. Bard did not renew her contract, leading Fisher to believe that she had been blacklisted by Vassar

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[3] The district court made the erroneous finding that "the College-wide faculty committee gave a positive recommendation for tenure." 852 F. Supp at 1230.

because she had by then commenced this lawsuit.[4] T. at 951-52. In the fall of 1988, she began study toward a Master's degree at Adelphi University's School of Social Work. She graduated in May 1991, passed her State Certification Examination in June of that year, and was soon employed as a social worker at the Poughkeepsie Continuing Treatment Center at a salary of approximately $29,900 a year. During her final year at Vassar, plaintiff had earned $27,000.

Fisher filed her complaint in the Southern District of New York on July 7, 1987 and the matter proceeded to trial in June and July of 1993, with the results outlined earlier in this opinion. A June 30, 1994 amendment to the May 16, 1994 opinion spelled out the remedies.[5] In addition to $626,872.12 in damages,[6] plus an award of attorneys' fees, the district court ordered Fisher

> restored to the faculty of the Vassar Biology Department for a period of two years, commencing

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4 As further evidence of Vassar's animosity toward her, plaintiff points to the difficulty she had securing the transfer of her laboratory from Vassar to Bard.

5 In its original May 16, 1994 opinion, the district court indicated that it was "unclear to the court whether Dr. Fisher still seeks reinstatement due to her change in career". 852 F. Supp. at 1234. In a hearing before the district court, plaintiff indicated that she still sought reinstatement as an associate professor.

6 The court found Vassar to be liable for $256,653 in back pay as the difference between the income actually earned by plaintiff between July 1, 1986 and June 30, 1994 and the average salary of an associate professor in the biology department at Vassar. Because the court found defendant acted wilfully, and because Fisher elected to receive her recovery under the ADEA, the court doubled this figure. Plaintiff's total recovery under the ADEA was $513,306. The district court found damages under the Equal Pay Act in the amount of $16,530. The court further ordered Vassar to make contributions on Fisher's behalf to the Teacher's Annuity Funds ($79,969.12) and Social Security ($17,067).

> with the Fall Term of 1994, to the rank of Associate Professor with tenure, at a salary equal to the average salary of an Associate Professor in the Biology Department at Vassar. . . . At the end of the two year period, Plaintiff shall be evaluated by Defendant for retention and promotion to the Full Professorship track.

Fisher, 852 F. Supp. at 1235. The court further amended its Findings of Fact and Conclusions of Law to address—and reject—broader injunctive relief:

> The court finds that the policy of discriminating against married women at Vassar College has changed and, presently, married women are hired and retained in the hard sciences departments. However, this policy change occurred after 1986, the year Plaintiff was denied tenure and after she filed her complaint with the New York State Human Rights Commission. Injunctive relief as to the policy under attack here is, therefore, not warranted at this time.

Id. The district court retained jurisdiction over the case in order to ensure compliance with its rulings. *Id.*

Vassar filed its notice of appeal on July 18, 1994 and Fisher filed her notice of cross-appeal on July 29, 1994. On September 28, 1994, the parties entered into a stipulation fixing attorneys' fees at a total of $392,205.75. On November 4, 1994, Vassar filed a separate notice of appeal concerning the attorneys' fees. By stipulation of the parties, the appeal concerning attorneys' fees was consolidated with Vassar's main appeal and Fisher's cross-appeal.

Although Vassar secured a stay of the money judgment and the attorneys' fee award pending proceedings in this Court, Vassar sought no stay of the portion of the judgment ordering Fisher's reinstatement as an associate professor. Plaintiff returned to Vassar on September 1, 1994. The college built her a new laboratory and furnished her with an assistant. She spent a portion of the 1994-95 academic year abroad in Grenoble at the University of Joseph Fournier. She is scheduled to return to teaching at Vassar in the fall of 1995.

On appeal, Vassar ascribes clear error to the fact finding on which the district court predicated liability under Title VII, the ADEA and the Equal Pay Act.

DISCUSSION

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A. Title VII Claims.

1. The McDonnell Douglas *test.*

Title VII provides in pertinent part:

> (1) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such indi-

> vidual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2. At the outset, let us make clear what this case is *not*. Contrary to the district court's conclusion, *see Fisher*, 852 F. Supp. at 1229-31, this is *not* a "mixed-motive" case falling under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as modified by the Civil Rights Act of 1991. Had there been direct evidence that Vassar had denied Fisher tenure because she was a married woman, it might have been appropriate to require Vassar to prove that it would have denied Fisher tenure even if it had not considered Fisher's marital status. *See Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion); *id* at 259-60 (White, J. concurring); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181-83 (2d Cir. 1992). But there was no such evidence, as we shall see. Moreover, this is *not* a disparate impact case falling under *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), as modified by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k). Fisher did not mount a disparate impact challenge to Vassar's tenure criteria. *See Fisher*, 852 F. Supp. at 1226 n.15.

Thus, Fisher's only chance of prevailing on her Title VII claim was by using the three-tiered burden-shifting framework enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Supreme Court devised a three-tiered burden-shifting framework for applying § 2000e-2. First, the plaintiff is required to present a *prima facie* case of discrimination which must include allegations (1) that the plaintiff is a member of a protected class, (2) that the plaintiff applied for and was qualified for a job for which the employer was seeking applicants, (3) that despite these qualifications, the employer rejected the plaintiff and (4) that,

after this rejection, the job remained open and the employer continued to seek applicants having the plaintiff's qualifications. *Id.* at 802.

If the plaintiff presents a *prima facie* case, the burden shifts to the employer, who is required to demonstrate "some legitimate, nondiscriminatory reason" for the decision. *Id.* The employer's burden here is one of production of evidence rather than one of persuasion. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The defendant need only articulate—but need not prove—the existence of a non-discriminatory reason. *Id.* at 254-56.

If the defendant carries this burden of production, the plaintiff then assumes the burden to "show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." *McDonnell Douglas*, 411 U.S. at 804. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. In *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), the Supreme Court held that, as to the third prong of the *McDonnell Douglas* test, it is not enough for a plaintiff to show that the defendant's legitimate, non-discriminatory reason for its employment decision is pretextual; the plaintiff must also prove by a preponderance of the evidence that defendant's stated reason is "a pretext *for discrimination*." *St. Mary's*, 113 S. Ct. at 2752 (emphasis added). The plaintiff must establish "*both* that the reason was false, *and* that discrimination was the real reason." *Id.* (emphasis in original).

2. "Sex Plus" Discrimination.

The basis of the discrimination alleged by Fisher under § 2000e-2 is her sex conjoined with her marital status. The Supreme Court has adopted the proposition that sex considered in conjunction with a second characteristic—"sex plus"—can delineate a "protected group" and can therefore serve as the basis for a Title VII suit. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). The defendant in *Phillips* refused to hire women with pre-school-aged children while hiring men who (viewed from the employer's perspective) had the same problem. In that case, there was no serious question of any general bias against hiring women; the district court had found that 75 to 80 percent of those hired for the position were women. Nevertheless, the Court held that "permitting one hiring policy for women and another for men—each having pre-school-age children"—violated Title VII. *Id.* at 544. *See also Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (sex plus pregnancy); *United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991) (sex plus fertility); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex plus gender stereotypes).

Some courts have specifically accepted the viability of a Title VII claim premised on sex plus marital status. *See Bryant v. International Schs. Servs., Inc.*, 675 F.2d 562, 573 n.18 (3d Cir. 1982); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197-98 (7th Cir.), *cert. denied.*, 404 U.S. 991 (1971); 29 C.F.R. § 1604.4 (discrimination against married women). As a matter of pleading, Fisher satisfied the threshold test of *McDonnell Douglas* by alleging discrimination against women. In any event, Vassar has not put in issue the sufficiency of plaintiff's *prima facie* case. However, we note that marital status is

not necessarily a bipolar distinction between people who are married and people who are not. The facts of this case entail other categories (*e.g.*, divorced, engaged, seriously involved, never married, etc.) that may become the object of supposed bias; as these splintered categories come into play, marital status may become an unmanageable factor for sex-discrimination analysis.

As to the second prong of the *McDonnell Douglas* test, Vassar has sustained its burden by relying upon the 14-page recommendation of the biology department. The report offered a "legitimate, nondiscriminatory reason" for dismissing plaintiff—her lack of scholarship, teaching ability, service and leadership. Regardless of Vassar's record in promoting women, married or otherwise, the school was under no obligation to promote Fisher if she was not qualified for tenure. Because Vassar has satisfied its step-two burden of production, the burden of persuasion shifts back to plaintiff.

The Title VII component of this appeal therefore chiefly concerns the third prong of the *McDonnell Douglas* test, the plaintiff's burden to demonstrate (a) that the College's explanation for denial of tenure was false and pretextual and (b) that the real reason for denial was discrimination based on either sex or sex plus marriage. *See St. Mary's*, 113 S. Ct. at 2752. In reviewing the district court's decision on these issues, we acknowledge that the district court's findings of fact should be disturbed only if they are clearly erroneous within the meaning of Fed. R. Civ. P. 52(a). *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 576 (1985); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 208 (2d Cir. 1990). We will not "upset a district court's determination simply because we would have reached a different conclusion had we considered the matter in the

first instance." *United States v. Juvenile Male # 1*, 47 F.3d 68, 71 (2d Cir. 1995). Rather, we will "disturb such findings only when we are left with the definite and firm conviction that a mistake has been committed." *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1038 (2d Cir. 1993) (citations and internal quotations omitted). On at least some of the material issues addressed by the district court, we are left that definite and firm conviction.

(a) Pretextual Decision-Making.

After a thoroughgoing analysis of the Biology Department's 14-page evaluation of Fisher, the district court concluded that "the termination of plaintiff's employment resulted not from any inadequacy of her performance or qualifications or service, but from the pretextual and bad faith evaluation by Vassar of her qualifications . . . ." *Fisher*, 852 F. Supp. at 1218. On appeal, Vassar contends that the district court paid insufficient deference to the academic standards and values employed in the process that led to the denial of tenure in this case. Vassar cites *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980), for the proposition that district courts should refrain from "infer[ring] discrimination from a comparison among candidates . . . ." *Id.* at 67. The *Lieberman* court voiced wise caution that the nation's universities and the federal courts might be heavily burdened if "the many adverse tenure decisions against women or members of a minority group that must be made each year [were] regularly taken to court . . . ." *Id.* at 62 n.1. The court noted:

> A university's prerogative to determine for itself on academic grounds who may teach is an important part of our long tradition of academic freedom. Although academic freedom does not include the

> freedom to discriminate, this important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments. The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as "Super-Tenure Review Committee[s]."

Id. at 67 (citations and internal quotations omitted, alteration in original).

Nevertheless, as the district court observed, Title VII applies to the academic community. As originally enacted, Title VII did exempt from scrutiny the faculty employment practices of educational institutions, but the Equal Opportunity Act of 1972 eliminated that exemption specifically. *See Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978). Congress has, therefore, given federal courts the unsought task of examining the sometimes surprising ways in which colleges and universities award tenure. *See Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984) ("Tenure decisions are not exempt under Title VII . . .").

According to Vassar, *Lieberman* stands for the proposition that comparative proof, measuring successful candidates against those rejected for tenure, is inadmissible in a Title VII case. That view was specifically rejected by this court in *Gibson v. American Broadcasting Cos.*, 892 F.2d 1128, 1133 (2d Cir. 1989): "In light of the strong remedial purposes expressed in the Civil Rights Act of 1964 and the 1972 Amendments to Title VII . . . we could hardly hold that relevant proof was inadmissible." Therefore, it was appropriate for the district court

to consider plaintiff's record and to compare it with the records of other Vassar professors.

The district court found that Vassar's tenure review of Fisher was conducted using standards that were unclear and unspecified. *Fisher*, 852 F. Supp. at 1227. However, since it is difficult to conceive of tenure standards that would be objective and quantifiable, the district court properly undertook to examine the enumerated criteria used by Vassar, however intuitive they may be, in order to detect their use as pretext. At the end of that examination, the district court found that the department's evaluation of Fisher was disingenuous in each category:

(i) Scholarship.

The district court concluded: "Based on the foregoing testimony and evidence, the court finds that [the biology department's] conclusions concerning Dr. Fisher's scholarship were made in bad faith, were pretextual, and represented the application of patently discriminatory standards." *Fisher*, 852 F. Supp. at 1209. As an example of the department's bad faith, the district court cited the department's criticism of plaintiff's productivity during the sabbatical year she took before coming up for tenure review. The department claimed that she had spent little time in the laboratory, thereby raising concerns "about the choices she made in respect to how to spend her leave year." JE at 221. In fact, as the district court points out, Fisher spent nine months out of her sabbatical year in a laboratory during which time she "collaborated with four different groups, submitted eight grant proposals, six of which . . . were funded, published one manuscript, wrote one other, served as a consultant to both the [National Science Foundation] and the [National Institute of Health] and presented papers at

national and international meetings." *Fisher*, 852 F. Supp. at 1205.[7]

(ii) Teaching.

The district court found that the biology department had distorted Fisher's teaching recommendations by "selectively exclud[ing] favorable ratings", by "focus[ing] on the two courses in which Dr. Fisher had difficulties" and by "applying different standards to her than were applied to other tenure candidates". *Id.* at 1209. Further, the district court observed that "the males tenured while Dr. Fisher was on the faculty were praised for their fine teaching while Dr. Fisher was criticized, although the facts on which the Committee's determinations were based (student evaluations, Biology Majors Reports and [Student Advisory Committee] reports) revealed that Dr. Fisher's evaluations were superior to theirs." *Id.* at 1211.

(iii) Service.

The district court did not undertake to compare Fisher's service in the academic community to the service rendered by others similarly situated, nor was the district court required to conduct a comparison of things so amorphous. Instead, after examining the Vassar Governance (the College's basic policy document), the district court found that service was not a significant factor in the tenure review process, *Fisher*, 852 F. Supp. at

[7] At least some of the district court's findings regarding plaintiff's scholarship were unfounded. For example, the district court criticized the College for "improperly ignor[ing]" the appraisals of the outside evaluators. 852 F. Supp. at 1205. However, Vassar's policy is to prepare department reports without considering such evaluations. The evaluations were, however, consulted by the Faculty and Appointments Committee, the dean and the president prior to the final vote on plaintiff's tenure.

1213, a finding that we accept. However, the district court's finding of pretext on this issue is unsubstantiated and conclusory:

> It is additionally significant that early evaluations by the Department of Dr. Fisher's service to the College and the Department were glowing. . . . The only explanation for the change in attitude towards Dr. Fisher that the court can find is the discrimination manifested in its decisions concerning her culminating in its decision in 1985 not to promote her.

Id. at 1213.

(iv) Leadership.

The Biology Department found plaintiff's leadership skills to be "a great disappointment". JE at 227. The district court reviewed the National Science Foundation's favorable reviews of the plaintiff as well as two previous evaluations from the biology department, and concluded that "Dr. Fisher's collegiality, personal relationships, and service to the College and to its students were more than satisfactory and that the opinions given contrary to this finding by the Biology Department were pretextual." *Fisher*, 852 F. Supp. at 1214. This finding is unsustainable. The biology department's previous reviews of Fisher had been far from uniformly glowing. The department's split 1982 recommendation concerning Fisher's reappointment stated:

> [S]he seldom takes an active part in discussion of issues in departmental meetings. Some of us believe that she is tentative about taking a position on issues and prefers not to commit herself openly. This represents a manifestation of her personality

> which may be viewed as a danger signal in respect to how she fulfills her collegial responsibilities.

JE at 197d. Notwithstanding her previous favorable reviews, by the time she came before the department for tenure consideration in 1985 the senior members of the biology department had concluded that she lacked the requisite leadership qualities:

> Part of Ms. Fisher's problem seems to be that she has difficulty in establishing straightforward, open, trusting, collegial relationships with others in the department. Another part of the problem is that she just doesn't often speak her mind on matters of departmental concern and thus falls short as an intellectually stimulating colleague and contributor to departmental policy-making. Her deferential attitude has been a continuing source of frustration.

JE at 227. Certainly her colleagues were in the best position to judge her "collegiality [and] personal relationships". The leadership section of the report makes clear that the senior members of the biology department simply did not like Fisher and did not wish to establish a career-long professional association with her. It is arguable that such grounds alone justified the department's recommendation against tenure.[8]

Nevertheless, neither "collegiality" nor any essentially social characteristic is listed in the Vassar Governance as a controlling aspect of tenure review. Therefore, even if the district court's analysis of plaintiff's leadership qualifications was clearly erroneous, the court's overall con-

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[8] Of course, social judgments are sometimes influenced by impermissible sexual stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

clusions regarding the overall assessment of the department report still survives appellate review.

(v) Summary.

The district court found that the biology department tenure report on the plaintiff was pretextual. We conclude that this findings is based on sufficient evidence presented to the court. Certainly, the portion of the district court's opinion that surveys the department's report does not provoke "the definite and firm conviction that a mistake has been committed." *See Cosgrove*, 9 F.3d at 1038 (internal quotations and citations omitted).

We recognize that in some situations

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons[ ] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . .

St. Mary's, 113 S. Ct. at 2749 (emphasis in original). *See also EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994); *DeMarci v. Holy Cross High Sch.*, 4 F.3d 166, 170 (2d Cir. 1993). Nevertheless, while this passage makes clear that "some cases exist where a prima facie case and the disbelief of a pretext *could* provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff[,] . . . . we do not think that the Supreme Court meant to say that such a finding would *always* be permissible." *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 261 n.3 (1st Cir. 1994) (emphasis in original); *see also United States v.*

Redondo-Lemos, 27 F.3d 439, 442 (9th Cir. 1994) (Kozinski, J.); *cf. Woroski v. Nashua Corp.*, 31 F.3d 105, 109-10 (2d Cir. 1994).

On these facts, the district court's finding that Vassar's "use of the tenure standards and process" was pretextual, *Fisher*, 852 F. Supp. at 1228, could not itself support a judgment for Fisher. It bears emphasis that the district court did not find Vassar liable simply because it disbelieved Vassar's proffered reasons for denying Fisher tenure. *See id.* ("Not only has plaintiff proven by a preponderance of the credible evidence that defendant's legitimate non-discriminatory reason . . . is pretextual, plaintiff has also proven that defendant's reason is a *pretext for discrimination*.") (emphasis added). Rather, the district court felt compelled to comb the record for evidence of discrimination, evidently convinced, as are we, that the finding of pretext here did not alone justify a finding of discrimination. *See id.* at 1228-29 (Vassar's unfair application of its tenure standards, together with statistical and anecdotal evidence, adduced to prove that Vassar had intentionally discriminated against Fisher). After all, "the ultimate burden of proof remain[ed] at all times with [Fisher] to demonstrate that illegal discrimination actually motivated" Vassar's decision to deny her tenure. *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 85 (2d Cir. 1994); *see Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994) (once employer articulates a non-discriminatory reason, "the plaintiff has the burden of proving that his age was the real reason for the discharge."). And an employer may offer a pretextual reason for a personnel decision that is nonetheless non-discriminatory, and the factfinder may review the record to determine the real reason for the personnel decision. *See St. Mary's*, 113 S. Ct. at 2755-56.

Doubtless, there are cases in which discriminatory intent is the only probable reason for the employer's proffer of a pretextual reason to the court. *See, e.g., Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995). Not so here. The finding of pretext affirmed in this opinion points nowhere, as the district court's own opinion suggests. *See Fisher*, 852 F. Supp. at 1228-29. Therefore, our ruling on pretext does not require as a corollary that we affirm the ultimate finding of discrimination. *See St. Mary's*, 113 S. Ct. at 2754 ("It is not enough . . . to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993) ("[A] Title VII plaintiff does not necessarily meet [her] burden of persuasion by convincing the factfinder that the employer's non-discriminatory explanation is not credible; rather the trier of fact must find that the plaintiff has proven [her] explanation of discriminatory intent by a fair preponderance of the evidence."), *cert. denied*, 114 S. Ct. 1189 (1994). Rather, we must review the record to see if the district court's ultimate finding of discrimination was clearly erroneous. *See St. Mary's*, 113 S. Ct. at 2756 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer," subject to the clearly erroneous standard of appellate review.); *id* at 2749 n.4 ("Even though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*") (emphasis added).

(b) Discrimination in Fact.

In arriving at the conclusion that Vassar discriminated against married women, the district court relied on four categories of evidence: anecdotes; perceived admissions made by Vassar officials participating in plaintiff's tenure review; statistics; and expert testimony. We review below the evidence cited by the district court in its opinion as well as other evidence offered by plaintiff at trial.

(i) Anecdotal Evidence.

The district court relied upon the experiences of Karen Friedman and Marlene Palmer, two unhappy former members of the Vassar biology department. Friedman and Palmer joined Vassar in 1977 along with plaintiff and had spouses during some part of their employment at Vassar. Neither was ever considered for tenure.

Friedman testified that she was married when she first came to Vassar and that the senior members of the biology department ignored her. She divorced while at Vassar and noticed that she was subsequently "included in social invitations" by various senior members of the biology department. T. at 1255. Several months after her divorce, Friedman began to date again. She soon "expressed some frustration at the limited pool of available men at Vassar College and expressed a desire to find [a] lasting relationship, and in fact to remarry at some point . . . ." T. at 1256. The invitations to social functions from the senior members of the biology department then "declined and stopped entirely." T. at 1256.

After Friedman was denied reappointment, she met with Ed Tokay, the acting chairman of the biology department. According to Friedman's testimony at trial,

Tokay told her that she had been denied reappointment, in part, because "there is an unspoken agenda"—which he did not define—at biology department deliberations. T. at 1345. Finally, Friedman testified that, before being considered for reappointment, she was asked to take a leave of absence without pay in order to engage in further research. She stated that her male colleagues were not asked to take similar leaves. Despite her compliance with this request (which ultimately amounted to two years' absence), she was denied reappointment.

According to the district court, "[e]vidence adduced from Dr. Karen Friedman indicated that there was a policy of discouraging married women who were hired in the sciences as assistant professors from advancing to tenure." *Fisher*, 852 F. Supp. at 1215. This conclusion is unsupportable. Nothing in the testimony of Friedman indicates that Vassar discriminated against married women. It is not remarkable that members of the academic community took special pains to offer her social invitations in the months after her divorce, or that these efforts trailed off when she began to date and became otherwise socially occupied. Friedman's conversation with Tokay, while cryptic, cannot be said to evidence a policy of the college or the department to discriminate on the basis of marital status, or indeed to discriminate on any basis. The "unspoken agenda" remains unknown. Finally, testimony offered by Friedman on cross-examination suggests that her leave was voluntary and undertaken in order to allow her to engage in further research before contract renewal. T. at 1349-50. Ultimately, the biology department recommended against Friedman's reappointment because the department found her research record to be weak. At the time she was denied reappointment, she was single.

The second anecdote relied upon by the district court concerned Dr. Marlene Palmer. As stated above, Palmer joined the Vassar biology department with the plaintiff in 1977. She left after failing to secure reappointment in 1983. Palmer did not testify at the trial; her account came into evidence by way of a letter written by Palmer to the Vassar Faculty Appeals Committee in November 1985 in support of plaintiff's appeal of her denial of tenure. The letter, which was read into the record during trial, stated in part:

> *3) Discrimination against Married Women:*
> Just prior to the 1979-80 school year, I married a man with 8 children, and attitudes toward me in the department (especially that of [Professors] Pat Johnson and Marci Greenwood) took a severe turn for the worse. This marriage made no difference in my work; nevertheless, the line of reasoning seemed to be that married men are stable and responsible but married women (especially those with children) will not give their all to the job. In fact, [Professor] Anita Zorzoli remarked to someone at my wedding that she predicted I would now retire to be a housewife and mother and give up science entirely. Aside from this comment, I can recall nothing specific that was said to me. However, my sense of being discriminated against on this basis was so strong that, when I discovered that I was pregnant in 1981, I voluntarily and secretly had an abortion. I knew they would terminate me at the next contract renewal if I had the baby. I thought I might have a chance if I did not have the baby.

Letter from Marlene (Palmer) Hutt to Janet Knapp, November 20, 1985, at 2, JE at 555. This letter was never offered to prove the matters asserted; it was admit-

ted into evidence by stipulation to show that the college received notice of these accusations and failed nevertheless to conduct a formal investigation. The district court, however, cited this letter—and specifically noted the story of the compelled abortion—to support findings of discrimination. *Fisher*, 852 F. Supp. at 1215. Admissibility aside, Palmer's vaporous account does not support the weight placed on it by the district court. Palmer's "sense of being discriminated against" is not evidence. The fact that this unsubstantiated "sense" alone caused her to have a (apparently no longer) "secret" abortion is sad but hardly significant.

The statements offered by Palmer and Friedman thus do not amount to evidence of discrimination based on marital status. In her brief on appeal, plaintiff cites three other examples of "direct" evidence of discrimination involving herself and various single women who either were or at one time had been professors in the Vassar biology department. None of the women, however, played any official role in plaintiff's tenure review. First, plaintiff testified to her conversation in a parking lot in 1979 with Professor Sue Lumb:

> I said, Sue, do I have to be the security blanket around here forever?
>
> And she said, oh, well, if we didn't promote those nice young men, they wouldn't stay.

T. at 55. Plaintiff defined a "security blanket" for the benefit of the court:

> A security blanket is a person who, in the academic world, is a person who hangs around when needed. If they need someone to teach a course part time, to be—teach one semester and then another, they're always there to fill in. And it's a term used partic-

ularly when talking about sex discrimination where women who are geographically trapped in an area who cannot move to get a better job are often used as, quote, security blankets, unquote, to fill in as needed. But not to be given rank and position or permanency.

T. at 56-57.

The second incident occurred while plaintiff was lunching with professor Anita Zorzoli, who was at the time on an unpaid leave with total disability:

I again said I was a little tired of being the security blanket around here. And without a second's hesitation she said, but, my dear, you have your children.

And I said, what relevance does that have to my performance as a biologist?

Well, she said, there was a 10-year hiatus in your career. Actually, it was only eight, but she made it 10.

I said, am I punished for having children and taking care of my family?

And she said, well, my dear, there is always part-time work for you.

And I said, Anita, how would you feel if 30 years ago you were given a part-time job with your credentials?

And again, without a second's hesitation she reported to me, she said, well, you and I are not in the same class. I did all this research when nobody did research at Vassar, etc. etc.

T. at 66-67. The final incident involved retired biology professor Margaret Wright:

> I asked her, what do you have to do to belong around here, Margaret?
>
> And she said, well, I didn't think you'd really want a full-time position because you have your family.
>
> To which I responded, what do you think I'm working so hard for, a part-time position? And that was the end of that conversation.

T. at 69.

It is remarkable that, in each of these three incidents, the (arguably) discriminatory characterizations were made by plaintiff. She described herself as a security blanket. She suggested she was being punished for having children. She suggested that she did not "belong." None of the incidents add up to evidence that Vassar had a policy of discriminating against married women. Even under plaintiff's own definition of "security blanket," that term does not apply solely to married women. Although the comments attributed to Zorzoli are patronizing and tinged with stereotypes, Zorzoli by that time had already begun her disability leave and played no role in the department's decision making process. Finally, although Wright reportedly made an impertinent assumption, she did not indicate that Wright (let alone Vassar) would disqualify plaintiff from a full-time position simply because she had a family.[9]

The district court opinion, which nowhere relies on these three conversations, properly discounts this type of

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[9] Of course, plaintiff's claim is not that she was dismissed for having a family but solely that she was dismissed for being a married women.

evidence in the context of the ADEA claim. In commenting on another statement made by Professor Lumb the court noted:

> Dr. Lumb's statement . . . is not attributable to the Tenure Committee's decision making process since she was not a member. This statement could be attributed to the sentiment of the Department but on its own does not meet plaintiff's burden.

Fisher, 852 F. Supp. at 1231 n.25. Neither professors Zorzoli nor Wright were at all involved in plaintiff's tenure review.

In sum, none of the anecdotal evidence offered by plaintiff supports a finding that Vassar had a general policy of discriminating against married women or that Vassar discriminated against plaintiff on the basis of her sex conjoined with her marital status.

(ii) Party Admissions.

The record shows no link between plaintiff's marital status and the decision to deny her tenure. The district court pointed generally to a "persistent fixation of the Biology Department's senior faculty on a married women's pre-Vassar family choices . . . ." *Fisher*, 852 F.Supp at 1216. The court cites a handful of invalid examples of what it deems to be this "persistent fixation".

One example is drawn from the text of the biology department's report:

> [B]eginning in 1965, at the end of her postdoctoral studies, she devoted, by her own report, nine years (1965-1974) entirely to her family and to her personal life. As far as we can tell from materials sub-

> mitted by her, Ms. Fisher attended no meetings, belonged to no societies, and ceased all communication with colleagues in the scientific community.

JE at 217. The district court also cites notes taken during the May 3 meeting of the Appointments Committee. According to these notes, the department represented to the Committee that Fisher was "*out of date*—out of field for 10 years." JE at 288. The district court found that these notations evidence the department's

> acceptance of a stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist and, therefore, is not one despite much evidence to the contrary.

Fisher, 852 F. Supp. at 1216. The disputed passage of the department report appears in an account of plaintiff's pre-Vassar career. It overstates by one year her withdrawal from academic life, but some reference to this period is to be expected if the readers of the report were to understand why her teaching career started years after the end of her post-doctoral training. The district court read into this tenure-relevant statement an unstated assumption that family life is incompatible with scientific pursuits. This jaundiced reading places a strain on the text, and erroneously assumes that family commitments naturally compel complete withdrawal from the scientific community.

Similarly, the note made at the May 3 meeting of the Appointments Committee—that she had been "out of field for 10 years"—overstates the length of plaintiff's hiatus, but is no more than an acknowledgment of an uncontested fact: plaintiff did spend a long period of time away from academia and biology. Indeed, the district court opinion later recasts its initial interpretation

of the "out of field" statement; a footnote offers the following non-discriminatory explanation for this statement: "The court interprets the Department's statement to the [Appointments Committee] . . . as an attempt to convey that she was not up to speed in educational requirements and/or research techniques . . . ." *Fisher*, 852 F. Supp. at 1231 n.25. We accept this interpretation, and conclude that the notation does not contribute to an inference of bias.

The district court further relied upon the trial testimony of professor Leathem Mehaffey:

> Q: Did you join in the thought that her being ten years away from active involvement in biological research represented a huge gap in her knowledge that was presently relevant to her being on tenure track?
>
> A: Yes, I think I did.
>
> May I explain a little bit?
>
> Q: Certainly.
>
> A: Largely because the field moves very quickly. Any field in biology moves very quickly. And ten years of not being actively involved in the field means that you have an awful lot of catching up to do, and that's what we were worried about here, just that there's an enormous amount of work to catch up.

T. at 1906. Based on these comments, the district court stated:

> Dr. Mehaffey admitted at trial that the fact that the time plaintiff had taken off in order to raise a family was a principal factor in the department's recommendation to deny her tenure. He felt that this

> represented a huge gap in her knowledge which she was unable to rectify. This statement was in spite of the fact that she was actively publishing and researching after her hiatus. This is also direct evidence that the Biology Department, perhaps still deeply rooted in the tradition of the hard sciences, was unable to overcome the stereotypical view of women as either scientist or wife—but not both.

Fisher, 852 F. Supp. at 1230 (citations omitted). But Professor Mehaffey never stated that "the time plaintiff had taken off in order to raise a family was a principal factor in the department's recommendation to deny her tenure." He merely agreed with the proposition that "her being ten years away from active involvement in biological research represented a huge gap in her knowledge that was presently relevant to her being on tenure track." A "relevant" factor is not the same thing as a "principal factor." Furthermore, nothing in Dr. Mehaffey's statements implies that the "factor" at issue was marital status. Plaintiff claims discrimination by reason of her status as a married women, not her status as a person who has taken time off from academia. It was clear error for the district court to consider Mehaffey's statement as evidence of discrimination.

Finally, the district court pointed to what it termed "evidence of a virtual smoking gun." *Fisher*, 852 F. Supp. at 1229. This gun and its smoke consist of a notation by Dean Sullivan on a copy of plaintiff's Faculty Record Card. The notation attributes to the president of Vassar the following comment: "overkill on dept's part." JE at 290. At trial, the dean stated that his notes were based on his "impression" of what the meeting participants had said and were not "verbatim". T. at 2108. He

offered two possible interpretations of what the "overkill" notation meant to him:

> The first possibility would be that what I was recording here was my sense that the president believed that the department's recommendation was harshly critical, in the light of outside evaluations which were on the whole positive, and student responses, which were on the whole positive. The other possibility . . . was that overkill on the department's part meant that the president felt that the department in what I believe is a 14 page memorandum single spaced, had strained to say the obvious, that the case upon its face lacked merit for promotion to tenure and that the department had simply overkilled, it had gone to extraordinary lengths to state [the obvious].

T. at 2108-09.

The district court interpreted these notes as "direct evidence that the President believed that the Department's recommendation to deny Dr. Fisher's application for tenure was not made without bias." *Fisher*, 852 F. Supp. at 1229. This interpretation is clearly erroneous, because it places too much weight on the word "overkill." The "overkill" notation can be construed to reflect the president's view that the department's report was vehement, but nothing in the statement or its context implies that the department's position arose from impermissible bias as opposed to, for example, strong opposition on principled grounds. In the absence of actual evidence of such an impermissible bias, the district court erred in assuming that one existed.

(iii) Statistics.

Statistics may be a part of a plaintiff's effort to establish discrimination under a theory of disparate treatment—the theory pursued by plaintiff before the district court. *See Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1285 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995). Fisher's effort to establish that Vassar discriminated against married women leans heavily on statistics. For a number of reasons, the district court's reliance on this data was clearly erroneous.

Plaintiff's statistical analysis was reproduced in the appendix on appeal.[10] Plaintiff's summary chart lists the names of 59 female professors who were employed by Vassar at or above the rank of visiting assistant professor for two years or more in the departments of biology, chemistry, mathematics, physics, geology and psychology at some point during the years 1956 through 1985. JE at 484. Of the 59 people, 19 already had tenure in 1956. The chart divides the remaining 40 professors into two periods: those who achieved tenure or left in the years 1956 through 1971; and those who achieved tenure or left in the years 1972 through 1985. For each time period the names are divided into two marital categories: single and non-single. Within each category, the chart indicates whether each professor was either "Promoted" (which means granted tenure) or "Terminated or left" (which includes professors who left Vassar for any reason whatsoever).

On the 1956-1971 chart, eleven names are categorized as being single. Six of these are listed as having been "Promoted" while five are listed as "Terminated or left".

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[10] At no point during the trial did plaintiff offer an expert to establish the technical validity of her statistical model. She did, however, offer the testimony of two "fact checkers". T. at 1291-1308.

Four women are categorized as non-single, and all of these are placed under the heading "Terminated or left." On the 1972-1985 chart, 14 names are categorized as being single. Eight of these are listed as "Promoted" while six were listed as "Terminated or left". Eleven women are categorized as non-single, and all but one of these are listed as "Terminated or left". Plaintiff's own name appears there. Thus, of a total of 15 non-single women listed during the 30 year period, only one (a psychology professor) was granted tenure. At trial, plaintiff argued (and the district court agreed) that this woman as well as the other psychology professors should be excluded from the list because psychology is not one of the "hard" sciences. In sum, plaintiff's statistics suggested that, of nine non-single women employed as professors at Vassar in biology, chemistry, math (which later included computer science), physics and geology between 1972 and 1985, none were awarded tenure.

Based on its reading of this statistical analysis the district court found as follows:

> In the 30 years prior to Dr. Fisher's tenure review, no married woman ever achieved tenure in the hard sciences (defined as Mathematics, Physics, Chemistry, Geology, Biology and Computer Science). This information was based on the Vassar College Directory of Administration/Staff/Faculty which is published annually by Vassar College and lists each person on the faculty with that person's rank, and in parentheses lists that person's spouse, if any. Such entries for the directory are voluntarily obtained from the professor himself or herself on a form solicited annually by the College Publications Office. Also consulted were faculty biography cards in the Vassar library where there are brief personal

biographical files on each faculty member. Between 1956 and 1985, out of 18 single women in the hard sciences department who received at least two year contracts at the Assistant Professor rank, ten were tenured and eight were terminated or left. From 1972 on, six out of nine were tenured. From 1956 to 1985, among nine women who were apparently married (by listing a male parenthetical name in the College Directory, or otherwise checked out as married from the biographical files of the College) all nine were terminated or left. Of the eight women on the Biology faculty for a period of two years in the rank of assistant professor from 1972 to 1985, three single women were tenured and the five married women left the faculty.

* * * *

[T]he court finds that never, in at least the 30 year period from 1956 to 1986 has Vassar advanced, through the four steps to tenure as stated in the Governance, any woman in the six "hard" sciences (Biology, Chemistry, Geology, Mathematics, Physics and Computer Science) whose marital status was at *any* time married between hiring as assistant professor and the tenure review, and that all women tenured in the hard science departments during this period were single at all times from appointment as assistant professor up to the grant of tenure, including all eight tenured from 1972 on, and including the three tenured in Biology. Moreover, the appropriate and available pool of applicants for positions in the Science Departments and particularly the Biology Department contained a large percentage of married women who would be satisfactory faculty if employed. Accordingly, this

> record shows an affirmative intent to deny tenure to married women in the "hard" sciences.

Fisher, 852 F. Supp. at 1215, 1218 (citations omitted).

We conclude that reliance on these statistics to support a finding of discrimination is clear error. For the most part the statistics do show that a number of departments at Vassar employ few female professors who are married; but close analysis discloses no evidence of discrimination based on sex (or sex plus something else). Plaintiff's statistical case is built on gerrymandered data and a series of statistical fallacies. A spurious correlation between the marital status of women and their promotion in the "hard sciences" at Vassar is created (a) by purposefully defining which sciences are hard and which are not; (b) by treating anecdotes as statistics; (c) by disregarding the pattern of school-wide tenure decisions; (d) by overlooking women who did achieve tenure in hard sciences; (e) by comparing married women to single women rather than by comparing women of each status with men similarly situated; and (f) by conflating marital status with status as a parent.

a. *Classifying "Hard Sciences"*. In 1983, the psychology department awarded tenure to Professor Gwen J. Broude, a married woman. This fact should have been reflected in the district court's analysis of plaintiff's statistics. At the time of plaintiff's tenure review, the Division III classification of Vassar's administrative structure was composed of the following departments: mathematics, physics, chemistry, geology, biology and computer science *and* psychology. Yet the district court (as plaintiff requested) excluded consideration of the Psychology Department from its statistical review. The district court acknowledged this discrepancy, but gave

no reason for it. Dean Sullivan, who served from 1978 through 1988, testified at trial that psychology was a hard science:

> Q: And would you say that the psychology department at Vassar College is part of the hard sciences?
>
> A: Yes, I would.
>
> Q: Why do you say that?
>
> A: Why do I say that? Psychology at Vassar, as well as psychology throughout the nation is an academic field, as opposed to as a clinical field, as an academic field is based on the same experimental methodology that biology and chemistry, physics are based on.
>
> It especially holds close paradigms and methods with biology. As there is great variety in the biological discipline, there's also a great variety is psychology. But our majors are required to take laboratory courses in experimental methodology, they are required to take courses in statistics, they are required to explore the primary scientific evidence, they are required to do experimental and other sorts of studies as part of their undergraduate education.
>
> It is very much an experimental science. Many of our subjects are people, but nevertheless, an experimental science.
>
> Q: And on that basis, how would you classify psychology as part of hard sciences?
>
> A: Well, if one needs to use hard or soft, I would say hard.

T. at 2217-18. Neither at trial nor in her brief has plaintiff refuted Dean Sullivan's testimony that psychology employs the same scientific method used in other hard science disciplines and is therefore a hard science. We can find no principled reason for rejecting Vassar's institutional grouping of psychology among the sciences characterized as "hard".

b. *Anecdotes as Statistics.* Plaintiff's "statistics" contain numerous errors in the categorization of the marital status of the various professors. At trial, plaintiff did not even pretend that her analysis of tenure decisions compared the experience of *married* women as compared with that of *single* women. Rather, according to plaintiff's counsel, the statistical chart differentiated on the basis of whether or not an individual woman was "perceived" as married:

> Now, if a woman wants to be married and teach at Vassar College and conceal the fact or not make a public demonstration of it, it may be that somebody slipped through our statistics. But since discrimination is based on perception to a large degree, it's our contention that no woman perceived to be married for 30 years has even been tenured at Vassar in the hard sciences.
>
> Now, maybe there was someone who secretly had a husband at home or maybe there was a married woman. Our statistics do not go into that at all. Our statistics are only the perception.

T. at 2227. This reliance on perception masks the unreliability of the sources used to compile plaintiff's numbers and her unwillingness to consult reliable sources of data. Moreover, the perception of marital status does not square with plaintiff's legal argument. At trial and on

appeal, plaintiff has argued that she was discriminated against on the basis of sex plus marital status, not on the basis of sex plus *perceived* marital status. We doubt that such a claim would be cognizable under Title VII.

In compiling her statistics, plaintiff relied in large part on the Vassar College directory. A professor who listed a spouse in the directory was counted as married. Testimony at trial, however, indicated that the directory was "notoriously unreliable." T. at 2334. Had plaintiff sought accurate information on marital status, she would have consulted the College Benefits Office. T. at 2293-94.

Plaintiff's methodology invited error. For example, Susan Cormier, a biology professor who was not granted tenure, is listed as married by plaintiff yet Cormier was never legally married. T. at 2283. Karen Kato Friedman, listed as married by plaintiff, was in fact divorced when she left Vassar. T. at 2282-2283. The Vassar directory never listed her as having a spouse. Shuler Richardson, married at the time of her tenure review, was single when she joined the Vassar faculty. T. at 2283. Pinina Norrod, who was granted tenure in the biology department the same year plaintiff was denied tenure, was married at the time she was hired by Vassar. T. at 2283. By the time she was considered for tenure, she had entered a long-term relationship with a man she eventually married. Patricia Johnson, one of the tenured members of the biology department at the time of plaintiff's tenure review, was a divorced woman with two children. T. at 2283. M.R.C. Greenwood, another tenured member of the biology department at the time it recommended against granting tenure to plaintiff, had been married and was divorced shortly before or immediately after she joined the Vassar faculty. T. at 1828.

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Some of the women listed by plaintiff as having been "Terminated or left", departed the Vassar campus for reasons completely unrelated to denial of promotion or tenure. For example, Christine Fahlund, a biology professor, apparently left Vassar in 1976 to relocate with her husband, who had taken a new job in another area of the country. T. at 2279. She was never denied reappointment. Susan West, listed among the non-single woman who were terminated or left, was never employed as a professor and was not a scientist. She worked at Vassar for ten years as a nursery school teacher and was listed as an assistant professor for purely administrative reasons. T. at 2262, 2267.

c. *School-Wide Tenure Decisions.* At trial, Vassar sought to introduce the testimony of Professor Orley Ashenfelter concerning tenure granted to married women on a school-wide basis. T. at 2067. According to the offer of proof, this testimony would have shown that nearly one out of six married women professors hired by Vassar between 1977 and 1984 eventually achieved tenure by the end of the 1983-84 academic year. JE at 743. Of the 23 married women faculty members considered for tenure between 1972 and 1984, 18 succeeded. JE at 690-91. This strongly suggests that, college-wide, there was no discrimination against married women in the tenure review process. JE at 690-91. The district court, however, excluded this testimony on the ground "that this case involves a claim that women in the hard sciences as defined by the plaintiff have been discriminated against." T. at 2067.

Review of a district court's evidentiary rulings is for abuse of discretion. *Eaglestone v. Guido*, 41 F.3d 865, 873 (2d Cir. 1994); *United Sates v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983). Even under this lenient standard,

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however, the court's failure to receive this expert testimony cannot be upheld. Evidence of the treatment of married women throughout the college was highly relevant to a proper assessment of plaintiff's claim. Tenure decisions at Vassar are considered at two levels: first, departments recommend professors for or against tenure; then the Appointments Committee and the president prepare a final recommendation for the Board of Trustees. There is no intermediate stage in which the departments deemed "hard" sciences participate collectively in the tenure review of scientists.

Given the small size of the "hard" sciences sample—plaintiff's summary chart for the years 1972-1985 shows a population of 11 "non-single" women—it is questionable whether any statistics limited to the "hard" sciences carries any persuasive weight as a matter of law. *See, e.g., Pace v. Southern Railway Sys.*, 701 F.2d 1383, 1389 (11th Cir.) (twelve employment decisions over twelve years too few to be meaningful); *cert. denied*, 464 U.S. 1018 (1983). At the very least, we hold that it was an abuse of discretion for the district court to fail to consider the university-wide statistics. The court's decision to base its analysis solely on the statistics related to the "hard sciences" was error.

d. *Women Granted Tenure in the "Hard" Sciences.* Plaintiff's statistics included all women who were "Terminated or left" while plaintiff was at Vassar. However, the statistics do not take into account what happened to women who were hired while Fisher was at Vassar, were not scheduled for tenure review until after 1986, and stayed on after plaintiff left Vassar in 1986. Thus, the only tenure-track women hired while plaintiff was at Vassar who were included in plaintiff's "statistical" chart were those who left the college, and the most

promising and successful of plaintiff's married female colleagues were excluded from the statistical model.[11]

There were six married female Vassar professors in the natural sciences who were in tenure-track positions at the time Fisher was denied tenure. Most did quite well. (1) Janet K. Andrews was hired as a member of the psychology department in 1979. She was married at the time of her reappointment in 1983 and at the time she was awarded tenure in 1988. T. at 2331, 2332; JE 668, 781. Had she been properly placed in plaintiff's statistical summary chart, she would have been placed in the married/promoted category. (2) Debra Meloy Elmegreen was hired as a member of the Physics/Astronomy Department in 1984. She was married at the time of hire, contract extension and during her 1990 grant of tenure. T. 2318, 2328; JE at 786. Had she been included in plaintiff's statistical summary chart she too would have been placed in the married/promoted category. (3) Janet M. Gray was hired as a visiting member of the psychology department in 1981. She was married when she was hired, when her contract was extended, when she was reappointed and when she was granted tenure in 1990. T. at 2217-2220, 2318, 2334; JE at 782. Had she been included in plaintiff's chart she too would have fallen into the married/promoted category. (4) Amy G. Halberstadt was hired as a member of the psychology department in 1981. She was married at the time of her reappointment in 1985 but had been divorced by the time she was denied tenure in 1988. T. at 2336; JE at 675, 789. Had she been included in plaintiff's chart she pre-

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[11] We acknowledge that the district court amended its initial opinion to include the finding that Vassar's policy of discriminating against married women in the hard sciences changed after 1986. *Fisher*, 852 F. Supp at 1235. Such a finding does not, however render irrelevant the evidence concerning the professors employed by Vassar during plaintiff's career.

sumably would have fallen into the married/terminated or left column. (5) Nancy M. Ide was hired as a member of the computer science department in 1982. She was married at the time of hire, contract extension and during her 1989 grant of tenure. T. at 2318, 2334; JE at 784. Had she been included on plaintiff's statistical summary chart she would have been placed under the married/promoted category. (6) Finally, Mary Louise Serafine was hired as a member of the psychology department in 1983. She was married at the time of her reappointment in 1987 but resigned before she could be reviewed for tenure. Had she been included in plaintiff's chart she presumably would have fallen into the married/terminated or left column. T. at 2335; JE at 785.

In sum, plaintiff's statistics excluded reference to four married women employed by Vassar during plaintiff's employment who subsequently received tenure at Vassar in a hard science department. The district court erred in failing to factor these individuals into its analysis of Vassar's treatment of married women.

e. *Sex to Sex Comparison.* Plaintiff's "statistical" model focused solely on Vassar's treatment of women. There is nothing to show how Vassar treated married men or unmarried men. Absent this sex-to-sex comparison, on a statistically sound basis plaintiff's statistics are meaningless. To establish that Vassar discriminated on the basis of sex plus marital status, plaintiff must show that married *men* were treated differently from married *women*. *See Bryant v. International Sch. Servs., Inc.*, 675 F.2d 562, 575 (3d Cir. 1982). (Higginbotham, *J.*) (to prevail, plaintiff must show "that married males, in circumstances similar to appellants, received better, or even different treatment"). One cannot expect a plaintiff to compare statistically significant groups of men and

women who have taken a prolonged hiatus from academia, but Fisher failed to present *any* evidence to show that married males who were up for tenure received "better, or even different treatment." *See id.*[12]

If Vassar was as unlikely to promote married men as it was to promote married women, then the only thing one could say is that Vassar discriminated against married people. But marital status alone is not a ground for bringing a suit under Title VII. Absent a legally and statistically meaningful comparison between men and woman, similarly situated, plaintiff's statistics carry no weight.[13]

f. *Marital Status and Parent Status.* The district court notes: "Part of plaintiff's claim of sex discrimination due to her marital status involves the fact that plaintiff left formal academia for approximately eight years in order to raise a family." *Fisher*, 852 F. Supp. at 1226. Ultimately, it is unclear exactly what allegations constitute plaintiff's claim. Did Vassar discriminate on the

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[12] In an instance in which the complainant establishes by evidence that there are no married males who were up for tenure and that it is unlikely that there would be any, then it may be that the complainant would be able to prevail by providing some other evidence of discrimination. However, since that situation is not presented, we need not reach that issue.

[13] Plaintiff's brief on appeal argues that the district court did compare Vassar's treatment of married women faculty members to married men when it compared plaintiff's qualifications to the qualifications of the four married men who were in the biology department while plaintiff was at Vassar and who obtained tenure prior to 1987. Brief of Appellee at 33-34. While the court did compare the academic and teaching records of these four men to the court's assessment of plaintiff's record, the plaintiff never in its statistical analysis differentiated between men who were married and men who were not. Thus, despite plaintiff's objections, her statistical analysis cannot be said to have compared Vassar's record of granting tenure to married men with its record of granting tenure to married women.

basis of sex plus marital status or on the basis of sex plus children, or sex plus a hiatus to raise children, or some combination of these theories? What is clear is that at no point did plaintiff offer statistics reflecting the treatment of women (or men) who had children.

All told, the statistics adopted by the district court are merely organized anecdotes. They cannot be credited or relied upon to support a result.

(iv) Expert Testimony.

Plaintiff presented expert testimony concerning the prejudice against married women in science. At trial Dr. Rita Simon, a sociologist, opined:

> Drawing upon data from a great many universities and thousands of responses from men and women in the hard sciences, and examining the performance of Cynthia Fisher, versus the other people who were coming up for tenure at the same time as she did, I concluded that Vassar was discriminating on the basis of marital status.

T. at 966. The district court concluded that this testimony

> established that in academia, married women are more productive than single women in many fields. Particularly in the "hard sciences", they are as productive as men, but are often not given the same rewards as either men or single women in terms of professional rank.

Fisher, 852 F. Supp. at 1216. Accordingly the district court concluded that Vassar has "consistently shown prejudice toward its married female faculty in the hard sciences," notwithstanding Vassar's protest that it "advances the cause of women." *Id.*

As the finder of fact, the district court was under no obligation to accept the word of Dr. Simon simply because she had been qualified as an expert. *See United States v. Williams*, 583 F.2d 1194, 1200 n.13 (2d Cir. 1978) (trier of fact entitled to reject expert testimony), *cert. denied*, 439 U.S. 1117 (1979). As it happens, Dr. Simon's conclusion concerning discrimination *at Vassar* was based on nothing more than (1) her own review of the statistics presented at trial by the plaintiff, T. at 958-62, and (2) Dr. Simon's own nationwide study of female science professors. T. at 956-57. Dr. Simon's own study arguably demonstrates that, nationwide, married women professors in the hard sciences have been more productive than other groups of professors. This broad-gauge observation has no probative bearing on the treatment of married women at Vassar, as to which Dr Simon relied entirely on plaintiff's statistics—statistics that are insubstantial, immaterial and riven by fallacies. Dr. Simon's conclusion was, therefore, not based on credible evidence. The district court's adoption of Dr. Simon's conclusion was clearly erroneous.

All told, plaintiff's evidence does not amount to proof sufficient to support a finding of liability. The district court's conclusion that Vassar college discriminated against plaintiff on the basis of her status as a married woman was clearly erroneous. We therefore reverse the finding of liability under Title VII.

3. Discrimination Based on Parenthood or Nurture.

The evidence supports an inference that Fisher's eight-year absence from academia hurt her chance for tenure. Fisher treats this hiatus as a proxy for having children and family and suggests that a sex-based animus thereby underlies this aspect of Vassar's tenure process. Vassar

argues (in its reply brief) that the only way a claim of "sex plus" discrimination could be predicated on the detrimental effects of prolonged professional inactivity would be by comparing (a) the tenure experience of women who took extended leaves of absence from their work (regardless of the reason), with (b) the tenure experience of men who had also taken long leaves of absence. Reply Brief at 13.

We agree. In making tenure decisions, it is perfectly reasonable to consider as a factor the candidate's prolonged absence from academia in making hiring and promotion decisions. The law does not prevent employers from considering such things. *Cf. Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994) (an employer is "require[d] . . . to ignore an employee's pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees"). Moreover, the choice of remaining at home for an extended period following the birth of a child "is not the inevitable consequence of a medical condition related to pregnancy". *Maganuco v. Leyden Community High Sch. Dist. 212*, 939 F.2d 440, 444-45 (7th Cir. 1991); *see also Schafer v. Board of Pub. Educ.*, 903 F.2d 243, 247 (3d Cir. 1990) (policy granting leave of absence for childbearing to female employees but not to male employees may serve as the basis for a Title VII claim). *Compare* Brief of *Amici Curiae* Equal Rights Advocates and NOW Legal Defense and Education Fund, at 2 (suggesting that only women have family responsibilities). A policy may discriminate between those employees who take off long periods of time in order to raise children and those who either do not have children or are able to raise them without an appreciable

career interruption. That is not inherently sex specific and does not give rise to a claim under Title VII.

4. "Simple" Sex Discrimination.

The district court concluded that plaintiff failed to set forth even a *prima facie* Title VII claim based on "simple" sex discrimination. In reaching this result, the court noted that several women sat on the departmental committee that recommended against tenure and that, at the same time Fisher was denied tenure, another woman (Pinina Norrod) was granted tenure and a man (Edward Tucker) was denied tenure. We agree with plaintiff that the district court erred in basing her dismissal of plaintiff's claim of simple sex discrimination on this rationale.

The participation of women in plaintiff's tenure review does not establish she was shielded from sex discrimination. Similarly, Vassar's grant of tenure to another female biology professor at the same time Vassar rejected the plaintiff does not exclude the possibility that plaintiff was subjected to discrimination based on her sex. *See Lam v. University of Hawaii*, 40 F.3d 1551, 1561 (9th Cir. 1994) (favorable treatment of one member of a protected class does not rule out the possibility that another member of the same class suffered discrimination); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1320-21 (6th Cir. 1988) (tenure position denied one female faculty member in favor of another). Nevertheless, at no point did plaintiff present any credible evidence that Vassar's decision to deny her tenure was in any way based on her sex.[14] Thus, whether or not Fisher established a *prima*

[14] In its *amicus* brief, the Equal Employment Opportunity Commission argues that the district court erred when it separated its analysis of sex discrimination from sex plus marriage discrimination. This is a valid criticism. Sex plus marriage discrimination is simply a sub-category of

facie Title VII case based on "simple" sex discrimination, she ultimately failed to carry her burden of persuasion. The reasons set forth above, any findings made by the district court to the contrary are clearly erroneous. The district court properly rejected plaintiff's claim of discrimination based on plaintiff's status as a woman.

B. Age Discrimination Claim.

The district court held Vassar liable for age discrimination, and relied on that violation of the ADEA to double Fisher's actual damages. 29 U.S.C. §§ 216, 626. In its appeal, Vassar argues that the district court improperly allowed plaintiff to amend her complaint on the last day of trial to include this claim and that the finding of discrimination under the ADEA was clearly erroneous.

1. Amendment of the Complaint.

At the close of plaintiff's case, the district court permitted Fisher to amend her complaint to include a claim for discrimination under the ADEA. Plaintiff's initial complaint made no mention of the ADEA and did not allege that Vassar had discriminated against her on the basis of her age.[15] Three times prior to the commencement of the trial, plaintiff amended her complaint; none of these amendments mentioned age discrimination or invoked the ADEA. When the issue surfaced at one pretrial stage of the case, Judge Cedarbaum (who had initially been assigned to the case) denied an application to

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sex discrimination. To discriminate on the basis of sex plus marriage is to discriminate on the basis of sex.

[15] Plaintiff's original complaint to the State of New York Department of Human Rights did note that she "charge[d] the respondent with denying [her] equal terms, conditions, and privileges of employment and dismissing [her] because of [her] *age*, sex, and marital status . . . ." Supplemental Joint Appendix at 1 (emphasis added).

add an ADEA claim. At a colloquy on the first day of the trial (by then before Judge Motley), plaintiff's attorney took note of that ruling and conceded that age was "not in the case."[16] On the last day of the trial, Judge Motley *sua sponte* suggested that plaintiff's attorney amend the complaint to include the ADEA claim. T. at 2390. The district court then heard further evidence from the plaintiff concerning this claim. At no point did Vassar claim prejudice by reason of this amendment or seek a continuance.

Fed. R. Civ. P. 15(b) allows a party to amend its pleadings to conform to the proof received into evidence. The decision of whether to allow such an amendment is left to the discretion of the district court judge. *See Grand Light & Supply Co., Inc v. Honeywell, Inc.*, 771 F.2d 672, 680 (2d Cir. 1985). When such a motion is made after the start of trial, however, it should be granted only "if the party against whom the amendment is offered will not be prejudiced by the amendment". *Hillburn by Hillburn v. Maher*, 795 F.2d 252, 264 (2d Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987). Ordinarily, the assertion of a new claim for liability on the last day of trial will be prejudicial. Nevertheless, absent an objection or a request for a continuance, it was not an abuse of discretion for the district court's decision to allow the amendment.

2. Merits.

ADEA claims are subject to the same burden-shifting applicable to Title VII claims, as outlined in *McDonnell*

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[16] Judge Cedarbaum's ruling excluding both the ADEA claim and the EPA claim was apparently based on her conclusion that plaintiff's initial complaint filed with the New York Division of Human Rights did not encompass these claims and that they were, therefore, barred. Judge Motley *sua sponte* revisited this decision.

Douglas and *St. Mary's*. In order to establish a *prima facie* case of age discrimination, Fisher was required to show (1) that she was at least 40 years old but less than 70, (2) that she was otherwise qualified for the job, and (3) that she was discharged "under circumstances giving rise to an inference of age discrimination." *See Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 359 (2d Cir. 1993). On appeal, defendant claims that plaintiff's ADEA claim does not meet the third of these *prima facie* requirements. In the alternative, defendant argues that, even if plaintiff could be said to have articulated a *prima facie* case of age discrimination, she has not ultimately satisfied her burden under the third step of *McDonnell Douglas*: she has not established that the reason she was denied tenure was discrimination based on her age. *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 920 (2d Cir. 1981).

A plaintiff may establish a claim of age discrimination through "direct evidence, such as statements by the employer that age was the reason for the discharge, or through proof of circumstances from which an inference of age discrimination may be drawn." *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 (2d Cir. 1984). If direct evidence is not available, "a plaintiff may through statistical evidence establish a pattern or practice of discharging or failing to promote older employees, from which an inference of age discrimination may be drawn." *Id.* at 119.

The district court's analysis of plaintiff's ADEA claim consisted of the following:

> [Plaintiff] was 53 years old at the time of her tenure denial, she was well qualified for the position and the statistical evidence on faculty members ages at

> tenure review showed that all other tenured faculty who were equally or less qualified than Dr. Fisher were at least nine years younger than Dr. Fisher when they were tenured.
>
> That some of the tenured faculty members were over 40 when they were promoted does not undercut this finding.

Fisher, 852 F. Supp. at 1230 (footnote omitted).

We uphold the district court's findings that plaintiff satisfied the first two requirements of an ADEA prima facie case. Fisher was clearly within the protected age group and, given that we have upheld the district court's assessment of plaintiff's credentials under the clearly erroneous standard, we proceed on the basis that plaintiff was otherwise qualified for the job. Furthermore, we agree with the district court that the mere fact that other faculty members were over 40 when they were granted tenure in the biology department does not foreclose a claim by plaintiff under the ADEA. *See Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). Although three of the other eight biology professors were over 40 years of age at the time they were awarded tenure by Vassar, all three were significantly younger than was the plaintiff, who was 53 at the time of her tenure denial. Thus, we conclude that plaintiff sufficiently set forth a *prima facie* claim of age discrimination.

Nevertheless, we find that the evidence presented to the district court was ultimately insufficient to support plaintiff's ADEA claim. As was the case with plaintiff's Title VII claims, resolution of this issue turns on the application of step three of the *McDonnell-Douglas* burden shifting test. Even if we accept the district court's

conclusion that plaintiff was qualified to receive tenure in the Vassar biology department, we reject the court's conclusion that she was denied tenure because of impermissible discrimination based on age.

The district court cited two items of direct evidence. First, responding to questions posed by the court at trial, Fisher testified that in 1979 Professor Lumb told her she "was too old to ever become tenured faculty." T. at 2392. Second, the district court cites to the comment at the May 3 meeting of the Appointments Committee that the Biology Department believed plaintiff was "*out of date*—out of field for 10 years." JE at 288. However, the district court specifically rejected the significance of this evidence:

> [T]hese statements do not establish, by themselves, direct evidence of an illegitimate factor. The court interprets the Department's statement to the [Appointments Committee] not as direct evidence that age played a part in its decision but rather as an attempt to convey that she was not up to speed in educational requirements and/or research techniques even though this is contrary to the evidence. Furthermore, Dr. Lumb's statement that Dr. Fisher was too old to be considered for tenure is not attributable to the Tenure Committee's decision making process since she was not a member. This statement could be attributed to the sentiment of the Department but on its own does not meet plaintiff's burden.

Fisher, 852 F. Supp. at 1231 n.25. To support the requisite "inference of age discrimination," the district court relied entirely upon a listing of the six faculty members who were already tenured in 1985, the one fac-

ulty member who received tenure in 1985, the first faculty member to be tenured after 1985, and Fisher herself, together with the age of each person at the time that person was considered for tenure:

Fisher	53
Norrod	44
Mehaffey	39
Hemmes	38
Suter	38
Schlessman	35
Williams	33
Johnson	44
Greenwood	48

Fisher, 852 F. Supp. at 1219.

This table does not amount to proof sufficient to support a finding of discrimination under the ADEA. Nothing in plaintiff's list indicates that Vassar had a policy or practice of denying tenure to older candidates. Plaintiff has not shown that Vassar discriminates on the basis of age; she has only shown that she was the oldest candidate in the biology department to have been considered for tenure. Since few candidates for tenure have had an eight year break in their careers, it is unsurprising (and not at all sinister) that most of the candidates to be considered for tenure in the biology department were in their late 30s and early 40s.

We would be reluctant in any event to draw conclusions from a sample of only eight faculty members out of a College-wide pool in excess of 100 faculty members who were eligible for tenure between 1972 and 1985. This circuit and others "have consistently rejected similar statistical samples as too small to be meaningful." *See Haskell*, 743 F.2d at 121 (ten terminations over

eleven years too few to be statistically reliable); *see also Pace v. Southern Railway Sys.*, 701 F.2d 1383, 1389 (11th Cir.) (twelve employment decisions over twelve years too few to be meaningful), *cert. denied*, 464 U.S. 1018 (1983); *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 723 (8th Cir. 1982) (15 employment decisions over eight years "too small to support any inference of discriminatory pattern or practice"); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977) (eight employment decisions over two years too few to be significant). The district court's conclusion that the evidence presented by plaintiff amounted to sufficient proof to establish a claim under the ADEA was clearly erroneous.[17]

C. Equal Pay Act Claim.

Vassar challenges the district court's award of damages under the Equal Pay Act on the grounds that (a) the district court abused its discretion in suggesting that plaintiff amend her complaint to include the Equal Pay Act claim after the conclusion of plaintiff's presentation of her case; (b) the claim was barred by the statute of limitations; and (c) plaintiff failed to prove her Equal Pay Act claim.

1. Amendment of the Complaint.

Plaintiff's claim under the Equal Pay Act was added at the conclusion of plaintiff's case. T. at 1357-59. Defendant objected to this amendment. T. at 1357. However, although the district court offered Vassar the opportunity to brief the issue at the end of trial, T. at 1359, Vassar

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[17] Because we conclude that the district court erred in finding Vassar liable on the ADEA claim, we have no need to consider appellee's additional contention on appeal that the district court erred in finding that Vassar's violation of the ADEA was willful.

never submitted such a brief and never argued that Vassar would be prejudiced by such an amendment.

As noted above, the decision of whether to allow such an amendment is left to the discretion of the district judge. *See Grand Light & Supply Co.*, 771 F.2d at 680. As in the case of the ADEA claim, defendant waived any objection it might have had to the amendment in this case by failing to timely file a brief in opposition to the amendment. The district court's decision to allow plaintiff to amend her complaint to include the Equal Pay Act claim was not an abuse of discretion.

2. *Statute of Limitations.*

Appellant urges for the first time on appeal that plaintiff's Equal Pay Act claim is barred by the statute of limitations. Whatever the merits of this argument, the statute of limitations is an affirmative defense and can be waived. *See Professional Firefighters Ass'n v. City of Clayton*, 759 F. Supp. 1408, 1415 (E.D. Mo. 1991). The defense cannot be raised for the first time on appeal. *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987). The amended complaint (which included the Equal Pay Act claim) was filed on September 24, 1993, two months after trial and nearly eight months before the court issued its opinion. Vassar never interposed the statute of limitations by way of answer or motion. Since this issue was never brought to the district court's attention, notwithstanding reasonable opportunity to do so, defendant has waived this defense.

3. *Merits.*

The district court assessed damages under the Equal Pay Act based upon a comparison of plaintiff's salary with the salary of Professor Robert Suter, a man hired as

a visiting assistant professor at approximately the same time as plaintiff. The court limited damages to the three year period from July 1, 1983 through June 30, 1986 for a total sum of $8,265. The court then doubled this sum to $16,530 pursuant to the liquidated damages provision of the Equal Pay Act.

Under the Equal Pay Act,

> [n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1). In order to sustain a claim under the Equal Pay Act, a plaintiff must demonstrate that the jobs at issue require "equal effort, skill and responsibility, . . . and are performed under similar working conditions," *McKee v. McDonnell Douglas Technical Servs.*, 700 F.2d 260, 262 (5th Cir. 1983), and that any difference in pay is attributable to sex. The defendant then bears the burden of demonstrating that one of four stated exceptions is applicable. *See Winkes v. Brown Univ.*, 747 F.2d 792, 793 (1st Cir. 1984).

In assessing the Equal Pay Act claim, the district court found that Fisher was paid less than some of her male colleagues with equal or lesser credentials. *Fisher*, 852

F. Supp. at 1232. The court further found that her duties were substantially similar to the duties of her higher paid male colleagues, noting that "the job of an assistant professor in the biology department is essentially the same with regard to skills required, effort involved and responsibility afforded to the instructor regardless of the specific courses being taught by that instructor." *Fisher*, 852 F. Supp. at 1232. Finally, the district court found that Vassar had "failed to present evidence that would show that the pay disparity was based on factors other than sex. *Fisher*, 852 F. Supp. at 1232.

Plaintiff argued that her salary should never have been lower than Suter's. Yet, plaintiff never introduced evidence establishing that she and Suter performed equivalent work. Indeed at one point, she acknowledged that he had responsibilities she did not share. T. at 2388.

Ultimately, the available data does not support the district court's ruling that Vassar paid junior female professors less, as a group, than junior male professors. Four pages of charts listing professors' salaries in the Vassar biology department are relevant to this inquiry. JE at 514-517. The first compares starting salaries of four people who started in the biology department in 1977: Fisher, Palmer (female), Friedman (female) and Suter (male). All we learn from this chart is that Suter, the male, earned less than one of the women (Friedman) and more than the other two (Palmer and Fisher). The second chart compares Fisher's salary to salaries paid to four of the men who entered the biology department during the 1970s. The chart demonstrates that, of those five professors, plaintiff is the only one not to have received more than the minimum required pay during her first year at Vassar. One foundational problem is that we do not know who else was hired in the biology department

in this period, or what starting salary they earned. Certainly the chart excludes other women hired in the 1970s, such as Friedman who (as the first chart shows) earned more than the minimum salary during her first year.

The third chart shows that plaintiff's salary was consistently lower than Suter's throughout her time at Vassar. Plaintiff consistently earned less than Suter. However, Suter was placed on tenure track in 1978, three years before Fisher, and remained ahead of Fisher. Thus, Suter was ultimately granted tenure in 1983, some two years before Fisher was denied tenure. Since Suter was more senior than plaintiff, it cannot be deemed unreasonable for Vassar to pay him more money. In her testimony before the district court, plaintiff acknowledges that tenure-track professors were entitled to receive a higher starting salary than non-tenured professors. T. at 517. Under the clear terms of the Equal Pay Act, there is no liability and no discrimination if salary discrepancies can be explained through either seniority or merit. 29 U.S.C. § 206(d)(1).

The final chart compares the salaries of seven biologists, four women and three men, during the first year of each professor's full-time Vassar contract. It shows that the two individuals who received the largest premium over the minimum starting salary were both women, and that the two individuals who failed to receive any premium over the minimum salary were also women. This chart, as well as the three preceding, fails to demonstrate that Vassar violated the Equal Pay Act. The district court's finding that Vassar discriminated on the basis of sex in setting its pay scales for junior professors in the biology department is without factual basis and is therefore reversed.

D. Attorneys' Fees.

Only a "prevailing party" may recover attorneys' fees and costs in a civil rights action. *See Clarke v. Frank*, 960 F.2d 1146, 1152 (2d Cir. 1992); 42 U.S.C. § 2000e-5(k). Our reversal of the district court on the merits of plaintiff's suit therefore would automatically require that we vacate the award of attorneys' fees and costs. In her sur-reply brief, however, plaintiff argues that we should reject Vassar's request to vacate the award of attorneys' fees and costs, regardless of whether or not we uphold the district court's finding on liability.

After the district court found that the plaintiff was "entitled to recover attorneys' fees and costs" and announced that "[a] separate hearing [would] be held on the matter," *Fisher*, 852 F. Supp. at 1234, the parties entered into a stipulation fixing the attorneys' fees. The document was signed by counsel, and was endorsed by the district court on September 28, 1994. The award of damages, together with these funds, were placed in an escrow account payable "only upon the completion and exhaustion of any appeals". JA at 361.

Win or lose, plaintiff argues, this stipulation bars any challenge to the award of attorneys' fees and costs. In support of this argument, plaintiff cites to *Cohen v. Virginia Electric & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986):

> Cohen now attempts to escape the effect of the consent judgment by arguing that he was only consenting to the amount of fees, and that he was doing so because the court had already ordered that fees would be awarded. Nevertheless, the plain language of the consent order makes clear that the parties are acquiescing in the award of attorneys fees. There is

> no indication on the fact of the order that Cohen was reserving any rights to appeal the judgment.

Plaintiff argues that we should follow the lead of *Cohen* and allow her recovery of her attorneys' fees notwithstanding our decision on the substantive claims.

We need not determine whether *Cohen* represents the law of this Circuit. The consent signed in *Cohen* was factually distinguishable from the stipulation signed in this case. The stipulation in this case recites that

> said amounts [are] to be paid out of the Escrow Fund . . . only upon the completion and exhaustion of any appeals from the said Order and Judgment dated June 30, 1994 [the liability judgment], and the Judgment for Attorneys' fees and costs to plaintiff as entered herein; or the final determination of any remand, retrial, or rehearing of any provision in said Order and Judgment filed June 30, 1994, or the Judgment to be filed herein; or of any appeal therefrom. Defendant has filed a Notice of Appeal on or about July 13, 1994 with the Clerk, United States District Court, Southern District, New York, appealing each and every part of said Order and Judgment, dated June 30, 1994, to the United States Circuit Court, Second Circuit. Defendant intends to file a Notice of Appeal with the Clerk, United States Court, Southern District of New York, appealing each and every part of the Judgment to be entered herein awarding attorneys' fees and costs to plaintiff, to the United States Circuit Court, Second Circuit. Defendant intends to request consolidation of its appeals from the two said separate judgments.

JA at 361. In thus reserving the right to challenge the award of attorneys' fees on appeal, the stipulation in this

case did exactly what the *Cohen* court found the stipulation before it had failed to do. Because plaintiff is not a "prevailing party," we vacate the district court's award of attorneys' fees and costs.

CONCLUSION

In summary, we vacate the judgments of the district court because we find that the district court's findings of liability on the sex discrimination claim, the age discrimination claim and the Equal Pay Act claim were clearly erroneous and because, absent success on one of these claims, plaintiff is no longer entitled to attorneys' fees. We affirm the district court's rejection of plaintiff's claim for "simple" sex discrimination. We have no need to reach plaintiff's cross-appeal challenging the terms of her reinstatement at Vassar. We direct the district court to dismiss plaintiff's lawsuit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CYNTHIA J. FISHER, :

Plaintiff,

87 Civ.4777 (CBM)

-against-

OPINION

VASSAR COLLEGE,

Defendant.

:

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APPEARANCES:

On behalf of plaintiff:

ELEANOR JACKSON PIEL, ESQ.
36 West 44th Street
New York, NY 10036

On behalf of defendant:

ANDERSON, BANKS, CURRAN & DONOGHUE
61 Smith Avenue
Mount Kisco, NY 10549

By: Maurice Curran
James P. Drohan

MOTLEY, District Judge:

Plaintiff's principle claims in this action are that defendant discriminated against her on the basis of sex and age; that defendant discriminated against her in the terms and conditions of her employment; and that defendant retaliated against her for bringing this discrimination claim.

A. INTRODUCTION

Plaintiff, Dr. Cynthia Fisher, brought this action against Vassar College under Title VII of the Civil Rights Act of 1964, as amended to apply to Universities in 1972 (42 U.S.C. 2000e et. seq.) alleging discrimination against her on account of her gender. The case was tried before the court commencing on June 14, 1993 and was completed on July 2, 1993.

Pursuant to the court's permission during the course of the trial (R. at 2392), plaintiff filed an amended complaint which made the following claims:

1. Plaintiff was discriminated against on account of her sex when she was denied tenure in May of 1985 in that male members of the Biology Department Faculty who had fewer qualifications than plaintiff, both prior and subsequent to her denial of tenure, were granted promotion to Associate Professor rank and tenure;

2. She was discriminated against in the denial of promotion and tenure on account of her status as a married woman;

3. During plaintiff's employment as an Assistant Professor of Biology from 1977 through June 1986, she was paid less in salary than men Biology faculty with similar assignments in violation of Title 29 U.S.C. 206 (d) (1);

4. Plaintiff was discriminated against on account of her age when she was denied promotion and tenure in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.§ 623; and

5. Plaintiff suffered retaliation from defendant in violation of 42 U.S.C. 2000e-3 in connection with a new position on the Bard College faculty which she secured after leaving Vassar.

Plaintiff seeks monetary damages, reinstatement on the faculty at Vassar with tenure and attorneys' fees and costs.

B. FINDINGS OF FACT

After hearing the evidence and weighing the testimony, exhibits received in evidence and the credibility of the witnesses, the court makes the following findings of fact:

1. Plaintiff, Dr. Cynthia Fisher, is a married woman with two daughters ages 27 and 24. She holds a Bachelor's degree from the University of Wisconsin and Master's and Ph.D. degree in Zoology from Rutgers University. (R. at 20.) She engaged in post-doctoral studies at Rutgers

Medical School from 1963 to 1965. Between 1974 and 1976, she taught biology as a part-time lecturer at Marist College in Poughkeepsie, New York. (Pre-Trial Order, II, E., 1; Exh. 7.)

2. Defendant, Vassar College, is an employer within the meaning of Title 42. U.S.C. 2000e-2.

3. Plaintiff was employed by the defendant from 1977 through 1986 as a member of the Biology Department Faculty. (R. at 22; Exh. 113.)

4. On March 29, 1985, the Vassar College Biology Department senior faculty recommended by letter to the Dean that Dr. Cynthia Fisher be denied promotion and tenure on the grounds that she did not demonstrate "the outstanding quality called for the 'Guidelines for Appointment, Reappointment and Promotion of Faculty at Vassar College' as set forth in the Faculty Handbook." (Pre-Trial Order, II, F., 6; Exh. 8.) The letter was confidential and, therefore, not seen by plaintiff until discovery in this action. (R. at 241.)

5. Dr. Fisher was informed of this decision on March 29, 1985, during a twelve-minute meeting with the Chairman of the Department, Leathem Mehaffey. Although Dr. Mehaffey had been delegated to explain to Dr. Fisher the Department's conclusions and reasons for recommending against tenure, he refused to discuss the Department's decision in any detail. (Exh. 98B.) Dr. Fisher received no further explanation of the Tenure Committee's position from the Biology Department, the Dean, the President or anyone else at Vassar. (Pre-Trial Order, II, F., 6; Exh. 98A-C.)

6. The Departmental letter recommending against

promotion and tenure for Dr. Fisher denigrated her scholarship, teaching ability and service; the three criteria considered on review. (Exh. 8.) The negative recommendation was unanimous as were all seven tenure recommendations made by the Department from 1979 to 1985. In 1987, a Dr. Schlessman was recommended for tenure in Biology by a 4-3 vote. (Exh. 24, 29, 32, 36, 39, 43, 117.)

7. Departmental recommendations are forwarded to the Dean and to the Faculty Appointments and Salary Committee (FASC) and each makes an independent recommendation. The Dean and the FASC then meet and compare their recommendations. Afterwards, they meet with the President of the College, who has also made an independent review and come to a final decision. (R. at 1424-25.)

Qualifications for Tenure Scholarship

8. The components of the "scholarship" qualification for tenure include peer-reviewed journal publications, the eminence or rank of the journals in which such publications appear, peer-reviewed extra-mural research grants awarded directly to the investigator (as distinguished from fellowship money), professional consultantships to national research institutions, papers presented at professional meetings with abstracts published, extra-mural research appointments, other in-house grants or fellowships and other lesser components[1] (R. at 839-41, 1113-15, 2196-97;

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[1] A comparison of the pre-tenure scholarship record of Dr. Fisher with the records of the men tenured in Biology prior to 1985 are summarized in Exhibit 77 and show her record to be superior. Both Drs. Mehaffey, (R. at 1515-17), and Suter, (R. at

Fallding Dep. at 25-26.)

Publications.

9. At the time of her tenure review, Dr. Fisher had seven peer-reviewed publications: six research papers plus an invited chapter. She also had a completed manuscript which was submitted in her dossier to the Biology Department and was subsequently published. Of these eight papers, three were pre-Vassar, and five were based on work done since she started at Vassar in 1977. She was second author on her first publication, and sole or principal author on all seven subsequent papers, including all five published while at Vassar. These publications were:

Leathem, J.H. and Fisher, C.J., Pregnancy and Protein Nutrition. V. Congresso Int. per la Riproduzione Animale e la Fecondazione Artificiale Bol. III: 274-276, 1964.

Fisher, C.J. and Leathem, J.H., Effect of a Protein-free Diet on Protein Metabolism in the Pregnant Rat. Endocrinology 76: 454-462, 1965.

Fisher, C.J. and Stetten, M.R., Parallel Changes in vivo in Microsomal Inorganic Pyrophosphatase, Pyrophosphate-Glucose Phosphotransferase, and Glucose 6-Phosphatase Activities. Biochem. Biophys. Acta 121: 102-109, 1966.

2419-22), claimed at trial that Exhibit 77 had omitted several components of their scholarship, but gave no documentation to support their claims.Dr. Suter admitted that none of the documents he claims was omitted was listed in his Curriculum Vitae.

Fisher, C.J. and Sawyer, R.H., The effects of Triamcinolone on the Development of the Bursa of Fabricius in Chick Embryos. Teratology 22: 7-12, 1980.

Fisher, C.J., Chick Embryos in Shell-less Culture. In:"Tested Studies for Laboratory Teaching: Proceedings of the Fifth Workshop/Conference of the Association for Biology Laboratory Education (ABLE)." Kendall/Hunt Publishing Co., Dubuque, Iowa. R. Ecklund, Ed., in press, 1984.

Fisher, C.J., W. M. O'Guin and R.H. Sawyer. Altered Keratin Biosynthesis Follows Inhibition of Scale Morphogenesis by Hydrocortisone. Developmental Bio. 106: 45-52, 1984.

Fisher, C.J. and R.H. Sawyer. Comparison of Hydrocortis one and Triamcinolone Inhibition on Scale and Feather Development. Teratology 33: 37-45, 1985.

The unpublished manuscript entitled "Vitamin-A-Induced Ptilopody Alters Keratin Biosynthesis," the logic of which was criticized by the Biology Department (Exh.8) was subsequently published under the authorship and titled: Fisher, Knapp and Sawyer, "Retinoid Acid Reticulate Scales." Teratology 38: 321-328, 1988.
(Exh. 7I, BH, 7 IV A, 58E-F, 130A.)

10. The Science Citation Index (S.C.I), published annually by the Institute for Scientific Information, establishes a standard for grading the importance of professional journals in which scientists' works appear. (R. at 1100-03.) The S.C.I. gives the citations to each author's past articles and the number of citations each year to over 4000 scientific journals published worldwide. The journals

are ranked in an annual volume called the S.C.I. Ranking Index from most-cited (number 1) to least-cited. The top-ranked five percent are those journals ranked from 1 to approximately 200. The frequency of citations of a scholar's work as listed in the S.C.I. and the rank of the journal in which the work was published are key measures of scholarship familiar to scientists and widely used by them. (R. at 1100-1115.) Dr. Fisher was published in some of the most prestigious journals and was more often the first author which is meaningful with regard to credit. (R. at 1109-10, 1113-14; Exh. BH.)

11. Among scientists, the number of citations to an article and the rank of its journal are a combined index of the importance of the work. The court has reviewed relevant pages from the S.C.I. for citations to Drs. Fisher, Hemmes, Mehaffey, Suter (three males) and Norrod (single female) and has further checked, with the help of expert testimony, the total numbers of citations in the S.C.I. to the pre-tenure, peer-reviewed publications of doctoral or post-doctoral research for Dr. Fisher and for Drs. Hemmes, Mehaffey, Suter and Norrod, the four recipients of tenure during the period Dr. Fisher was on the faculty to whose records Dr. Fisher's record must have been compared, as well as for Dr. Mark A. Schlessman, the male who was granted tenure in 1987. The court has made the following comparisons as to these journal publications and their comparative importance. (Exh. 108A, 108BB, 108CB; R. at 218-219, 1103-1115):

a) Dr. Fisher had 50 citations to her papers in top five percent journals (ranked 7 to 109) and four citations to a paper in a 766 rank journal. (Exh.7I, 77 p.6, 108BB, 108C; R. at 223-24, 1103- 1115.)

b) Dr. Norrod, a single female granted tenure on the recommendation of the Biology Department the year that Dr. Fisher was turned down, had 39 citations to her papers in top five percent journals (ranked 19, 70) and 31 citations to journals ranked 236 to 1,406. (Exh. 73, 78B pp.4-5, 108BB; R. at 212-18.)

c) Dr. Suter, a male who received tenure in 1984 had no citations to papers in top five percent journals and had 26 citations to journals ranked 428 to 3340 out of 4000. (Exh. 69, 77A pp.4-5, 108BB, 108CA; R. at 211-13.)

d) Dr. Mehaffey, a male who received tenure in 1980, and chairman of the Biology Department in 1985 at the time Dr. Fisher was considered for tenure, had no citations to top five per cent journals and had five citations to one article in a journal ranked at number 296. At the time of his tenure review, he had five published papers and was first author on only one of them. All these papers were based on pre-Vassar work. At the time of tenure review, he had one paper published from his six and one-half years of work at Vassar and was a second author. (Exh. 67, 77A p.3, 108BB, 108CA; R. at 211-13, 1108-09)[2]

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[2] At trial, Dr. Mehaffey claimed that he had 28 citations and that Dr. Fisher had only five. (R. at 1518-19.) He reached this conclusion by counting for himself citations to papers which had been published from pre-Vassar work done at Harvard and on which he was not first author and where he was not even listed in the S.C.I. due to the fact that he only played an assisting role (first authors were Drs. Berson and Rabin). (Exh.66.) In his count and comparison, he omitted Dr. Fisher's pre-Vassar work

e) Dr. Hemmes, a male who received tenure in 1979, had 21 citations to one article in a top five percent journal which was ranked at number 75. (Exh. 65, 77 p.2, 108BB, 108CA; R. at 211-13.)

f) Dr. Schlessman, a male who received tenure in 1987, did not have any citations to top five percent journals and had six citations to a journal ranked 2634th. His other publications were in journals not listed in the S.C.I., and, therefore, are not counted. (Exh. 124, 77 pp. 8-9, 108A, 108BB, 108CA; R. at 211-13.)

12. The court finds, based on the evidence, that Dr. Fisher's publication record in prestigious journals was superior to that of the three males who received tenure prior to the consideration of Dr. Fisher for tenure and the male who received tenure subsequently in 1987 and was relatively equal to that of the single female who was promoted.

13. As part of its negative tenure recommendation, the Biology Department Committee falsely stated to FASC that the journals in which Dr. Fisher had published were "less impressive" than those in which Dr. Pinina Norrod, an unmarried female granted tenure the year Dr. Fisher was turned down, had published. (Exh. 14.) While a major portion of Dr. Fisher's publications appeared while she was teaching at Vassar, all of Dr. Norrod's publications were pre-Vassar. (R. at 1051-52.) There had been no break in Dr. Norrod's career as there had been in Dr. Fisher's. (R. at 1062.) Furthermore, in proceedings before the FASC

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where she was listed in the S.C.I. as first author. (Exh. 7.)

regarding Dr. Fisher's tenure which took place two months after the Department had made its recommendation, (Exh. 8), the FASC noted that Dr. Fisher's research was performed "under more difficult circumstances than [Dr.] Norrod['s] [and was] somewhat wider in range." (Exh. 14; R. at 2148-2150, 2172.) Therefore, even if Dr. Norrod's publication record was considered to be more impressive than Dr. Fisher's record, her success was achieved without the extra burdens Dr. Fisher faced as a professor of biology.

14. In continuing its criticism, the Department stated to the FASC that the journals in which Dr. Fisher had published "were fairly narrow and highly specialized." (See Glen Johnson Dep. at 15; Exh. 14.) However, in 1984, the Department did not remark on the journal rankings of Dr. Suter's publications or comment on the breadth or narrowness of his research which was exclusively on spider behavior. (Exh. 32.)

15. Dr. Fisher's published research had major importance to other scientists and was the opposite of "narrow and specialized." The three outside experts who evaluated Dr. Fisher's scholarship for Vassar's tenure review process commented that her work was: 1) important to other scientists working on "skin biology, genetics, cellular and developmental biology and mechanism of teratogenesis (birth defects)," (Exh. 12C p.2); that 2) "her papers are published in well-respected and refereed journals," (Exh. 12C, p.1); and 3) that her work "has made an important contribution to the study of development in the skin," which "may have important implications to other areas such as cancer research . . . ." (Exh. 12B, p.1.)

16. The practice in science and among scientists in producing major research papers is to collaborate with other

scientists. The first author on a multi-authored paper is the principal investigator, with the other listed authors having supporting roles. The S.I.C. cites the first author. (Exh. 108A; R. at 1109-10.) The Biology Department represented that Dr. Fisher's research was derived from collaboration and was therefore not self-directed. (Exh. 8 p.5 para. 3, 14 p.2.) These conclusions were without foundation in fact. Dr. Fisher's published collaborative papers all resulted from projects she designed and carried out. (R. at 259-64, 852-53; Exh. 7-IV-G.) Moreover, Dr. Fisher's independence as a scholar was further confirmed by her being awarded a number of National Science Foundation (NSF) grants as sole or co-principal investigator while at Vassar. (Exh. 7I; R. at 253-56.)

17. Dr. Fisher's research independence may be contrasted with that of Drs. Hemmes and Mehaffey by comparing her number of first authorships with theirs. (Exh. 7, 64, 66; summarized in Exh. 77.) While Dr. Fisher was first author on five collaborative papers, Drs. Hemmes and Mehaffey were first authors on only one paper each at the time of their tenure reviews.

18. Moreover, both Drs. Hemmes and Mehaffey were praised on tenure review for their extra-mural collaborations. (Exh. 24, 29.) In addition to praising the quality of these collaborations, the Biology Department went far to excuse the lack of publication which resulted from these collaborations. (Exh. 24, 29.)

19. Without any support in the factual record, the Biology Department recommendation letter questioned the quality of Dr. Fisher's scholarship by, among other things, criticizing five of her papers. The letter stated, "[w]e have serious questions concerning the quality of the scholarship,

"-- her work was "purely descriptive" and made "no interpretive claims." (Exh. 8 p.3 para. 5.) Dr. Castellot, an expert witness, noted that one of Dr. Fisher's papers was important in its demonstration that a chemical used in humans to treat a number of diseases could cause birth defects. (R. at 1119.) Another paper addressed possible regulatory mechanisms in chick scale development. (R. at 1121.) However, the Biology Department Tenure Committee only considered the paper "a good experimental report," and concluded that Dr. Fisher was "dependent on her co-authors" in her work. (Exh. 8 p. 4 para. 1.) The Committee also concluded from her colloquia presentations, presentations required by the Biology Department for untenured members in a review year, that she "lacks both understanding and expertise" and "does not understand" the "significance [of her work] to [its] interpretation." (Id.) As there were no indications of her inability to understand her work in this paper, the court finds that the Department's criticism of this paper made unwarranted assumptions, was not based on any scientific rationale, and baselessly stated that she did not understand the biochemistry involved. (R. at 1122-23.) The criticism of a third paper stated that the paper represented unsound experimental thinking. (R. at 1125.) But in light of the fact that the Department did not carry out a statistical analysis of the experimental design, the criticism was again unwarranted. (Id.) The Department avoided dealing with the significance of the work which showed the higher potency of one chemical than another in the development of chick scales. (R. at 1127.) As to the fourth paper, the Committee opined that "[t]he logic by which she derives this interpretation is impossible to follow." (R. at 1128.) The Department again made unwarranted critical remarks and failed to check the substance of a reference in the paper which would have answered the questions the Department had concerning the

dosage used in that particular experiment. (R. at 1127-31.) As to the fifth paper, the Department failed to acknowledge the value of the paper to research laboratories. Additionally, the Department unduly criticized her work for being based on a high school student's project instead of acknowledging that science always involves input from many people with each person often profiting from the work of others. Therefore, all improvements made by a person on others' work are significant scientific developments. (R at 1132-35.) These comments about Dr. Fisher's work had no foundation in fact, (Fallding Dep. pp51-53, 59, 65-67), and clearly demonstrate bias against Dr. Fisher and the pretextual nature of the recommendation against her.[3]

Each of the papers published, or accepted for publication by journals, had already been reviewed by several neutral expert scholars serving as editors of the respective journals. Papers submitted with the kinds of defects described by the Committee's letter are seldom published by these prestigious journals. (R. at 891-898, 1115-1144; Fallding dep.pp. 169-174, 205.) The Biology Department Tenure Committee's representation that these journals were not "top rank" was pretextual and made in bad faith since the members of the Committee, all of whom are biologists, were familiar with the standards of the S.C.I. and the rankings of the journals in which Dr. Fisher had published since the S.C.I. is well recognized among scientists and science teachers. (R. at 1100-10.) Even without any study of the S.C.I., the Committee should have been aware of the eminence of the journals in which Dr. Fisher published. Moreover, the

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[3] Similar testimony supporting the importance of each of the five Fisher articles criticized by the Department was given by Dr. Fallding who is an expert in skin teratology. (Fallding Dep. pp.45-47.)

Department could not in good faith have believed that Dr. Fisher's work was more narrow and specialized than Dr. Suter's work on spider behavior, for which he was commended in the Department's recommendation for his promotion and tenure the previous year, (Exh.32), or that Dr. Fisher's work was less important than that of Drs. Mehaffey and Hemmes. (R. at 891-898.)

20. Dr. Fisher's published research was commended, without reservation, by all three outside evaluators who evaluated Dr. Fisher for tenure review, by three expert witnesses at trial (two live witnesses, (Drs. Harding and Castellot) and one by deposition (Dr. Fallding)), and implicitly by the dozens of peer experts who reviewed and approved her published papers and her funded research grants. The only criticism of Dr. Fisher's scholarship came from Vassar's Biology Department. Generally, less weight is given to faculty opinion within a department than to outside experts since it is the outside experts who presumably know the field better. (Fallding Dep. pp. 169-173.) The Court notes that Vassar offered no expert witnesses to counter the expert testimony adduced by plaintiff.

21. The Court finds that the Biology Department's conclusions concerning the journals in which Dr. Fisher had published and the other comments the Department made about her published works in its assessment of her for tenure were disingenuous, pretextual and clearly made in bad faith, particularly in light of the fact that the persons making the statements concerning the assessment knew the false premise on which the conclusions were based.

Grants.

22. Further on the issue of scholarship, the court has reviewed Dr. Fisher's record concerning extra-mural, peer-reviewed grants and has found that at the time of tenure review, Dr. Fisher had the following grants:

(a) **Research Grants:** (the last four were obtained during Dr. Fisher's teaching career at Vassar)

NSF Co-op Graduate Fellowship, 1961-63 (Exh. 7I)

American Association of University Women (AAUW) Fellowship, 1961-62 (Exh. 7I)

National Institutes of Health (NIH) Post-doctoral

Fellowship, 1963-65 (Exh. 7I)

NSF Small College Faculty Opportunity Award, 1979 ($3,900) (Exh. 7I, 61H, 7IV B)

NSF Scientific Equipment Grant, Principal Investigator, 1981 (No. 8109084: $18,480) (Exh.7I, 7 IVB, 61G)

NSF Research at undergraduate Institutions Grant,

Principal Investigator, 1984-86 (PCM-8402332: $40,000) (Exh. 7I, 61A, 7 IV B)

NSF Research Grant, Co-Principal Investigator, 1984-87 (PCM-8402104: $204,000*) (Exh. 7I, 61E, 7 IV B)

(b) **Research Equipment for Teaching Grants**

NSF Instructional Scientific equipment Program Grant for Physiology Laboratory at Marist College, Co-Principal Investigator 1976 ($12,000*) (Exh. 7I, 61I)

NSF ISEP Grant for Tissue Culture Laboratory, Vassar College, Principal Investigator, 1980 (SER 8014038: $12,500*) (Exh. 7I, 61F.)

*There are discrepancies concerning the monetary amounts of these three grants. The amounts as listed above were taken from Dr. Fisher's Curriculum Vitae (Exh. 7I.) However, the amounts listed in exhibits 61E, 61I and 61F are $145,000, $6,000 and $6, 256 respectively. It is unclear whether there were amendments to the grants which would explain the differences in these amounts.

(c) **Vassar College Intra-Mural Grants**

1979 Beadle Fund Grant (Exh. 60P.)

1979 Mellon Grant for Faculty Development (Vassar College) to attend Scanning Electron Microscopy course at SUNY, New Paltz (Exh. 60W.)

1980 Beadle Fund Grant (Exh. 60Q.)

1980 Mellon grant for Faculty Development (Vassar College) to attend Transmission Electron Microscopy course at SUNY, New

Paltz (Exh. 60BB.)

1981 Beadle Fund Grant (Exh. 60S-T.)

1981 Mellon Grant for Faculty Development (Vassar College) to set up an "in house" Photomicrography Course ($2,000) (Exh. 60EE-FF.)

1983 Mellon Grant for Faculty Development (Vassar College) for Microscopy Course, M.B.L., Woods Hole, MA ($1,014) (Exh. 7I.)

1983 Beadle Fund Grant (Exh. 7I.)

1984 Mellon grant for Faculty Development: Research at U. Grenoble, France ($1,470) (Exh. 7I.)

23. The Biology Department Committee, in its negative tenure recommendation, minimized the importance of Dr. Fisher's many grant successes. The Committee incorrectly stated that one of her grants was secured only after five unsuccessful attempts. (R. at 253-54.) While it noted that having to make several attempts is not unusual due to the competitiveness of securing national grants, the Committee misrepresented the facts. (Exh. 8 p.3 para. 1.) This grant was in fact accepted on the fourth revision. (R. at 1833-34.) In addition, the Department down played the importance of Dr. Fisher's Research in Undergraduate Institutions (RUI) grant by incorrectly calling it "less competitive" than regular grant programs when, in actuality, RUI grants are considered equally as competitive. (R. at 857-58, 254; Exh. 8 p.3 para. 1.) The departmental letter even criticized the

soundness of Dr. Fisher's funded grant applications implying that the expert peer reviewers for these highly competitive national awards were somehow remiss in failing to spot the defects in her work which the Vassar Biology Department was able to discover. (Exh. 8 p.5 para. 2.) Research grants are awarded by the NIH and NSF under extremely competitive circumstances and only after intensive review by a panel of expert peers in the scientific discipline of the person submitting the grant. (R. at 857-58, 860-61; Fallding Dep. pp.47, 70-73.) These criticisms were in sharp contrast to recommendations made concerning the three male candidates who had been granted tenure while Dr. Fisher was on the faculty. (R. at 892; Exh. 8, 24, 29, 32.)

None of these candidates was directly awarded any extramural peer-reviewed research grants while at Vassar College.[4] (Exh. 64, 65, 67, 68, 69, 77.) Dr. Schlessman, a male who was tenured in 1987, had one peer-reviewed research grant from a private foundation, the Research Corporation. (R. at 891; Exh. 124.)

24. It is significant that each of the three named male candidates, in the tenure recommendation of the Biology Department at the time of their tenure review, prior to the review of Dr. Fisher, were excused for not obtaining a funded peer-reviewed grant while Fisher's success in obtaining grants was minimized. (Exh. 24, 29, 32.)

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[4] At trial, Dr. Mehaffey claimed he had some grants for which he had not been credited on Exhibit 77, but he produced no documentation to verify this claim and admitted that they did not appear in either his Curriculm Vitae or in his tenure dossier. (R. at 1515-17, 1910-11.)

25. The Committee belittled the prestige of Dr. Fisher's grant at the University of South Carolina, which she shared with Dr. Patricia DeCoursey, as co-principal investigator, by stating that "it was not related to her major research interest." (Exh. 8.) This conclusion was erroneous, in fact, since Dr. Fisher's collaborative work with Dr. DeCoursey applied Dr. Fisher's culture technique from Developmental Biology to a behavioral field and to study of the brain. (Exh. 61E; R. at 860-61, 255, 558-59.) Moreover, the Department's inference that a co-principal investigator is less important is "not at all" true. (Fallding Dep. p.79.)

26. On one NSF grant, "Effect of Adrenal Steroids on Scale Morphogenesis and Keratin Biosynthesis," the Committee misrepresented the record with respect to a letter from Dr. Fisher to Dr. Poodry (the Poodry letter), the Program Director of Developmental Biology at the NSF, in which she enclosed the NSF's assessments on unsuccessful grant applications to show how she had addressed the criticisms therein. Despite the fact that the revised application won the sought after grant, the unfavorable Departmental recommendation quoted language from these unfavorable grant reviews. (Exh. 62A.)

The Committee commented that "several flaws...not mentioned in the reviewers' comments" in the funded proposal put the Committee in disagreement with NSF which found no weaknesses when it awarded the grant. (Exh. 8 p.5 para.2; R. at 110-116, 581-587, 591, 876-879.) The Poodry letter was part of a revised and renewed application for the grant. The court finds the Committee's quotation of language from the Poodry letter and the attached reviews in its recommendation to be purposeful dishonesty. More specifically the court finds the dishonesty purposeful in light of the fact that the misquotation came

about because the chairman of the Department deliberately asked Dr. Fisher to remove clarifying excellent NSF reviews of her work and to leave the critical assessments of the unfunded grant proposals in her departmental file. (R. at 111.) In any event, the other senior members of the department must have know that grants which receive only fair to good ratings, as the Department characterized her grants, are not funded. (R. at 1135-38.)

27. With respect to the successful grant proposal (Exh. 61E) Dr. Fisher shared with her sister, Dr. DeCoursey, the Committee gave all credit to her sister despite the fact that Dr. Fisher was the co-principal investigator, implying that she should not be credited for any scholastic contributions to the project. (Exh. 8 p.5 para.3.) Dr. Fisher was further criticized for talking about this proposal at her research colloquium because the research had not yet been "perfected." (Exh. 8 p.3 para. 2, p.6 para.1.) This was a spurious criticism since her colloquium involved a review of the techniques she invoked to secure her grant proposal; which in this instance involved the application of methods she had previously used in another field. (R. at 558-59, 859-63, 1140; exh. 8 p.6 para.1.)

28. The same 1985 Department Committee which belittled Dr. Fisher's NIH and NSF grants, strongly recommended Dr. Pinina Norrod. (Exh. 39.) In fact, the Department specially pled the necessity for Dr. Norrod's tenure that year in the face of the FASC's recommendation to deny her tenure. (R. at 1874; Exh. 9C.) Furthermore, the Committee emphasized the competitive nature of the grants Dr. Norrod had received and the "respect for her work in the larger scientific community" that such grants represent. (Exh. 39, p.4.) The Committee recommended tenure for Dr. Norrod despite her having been on the Vassar

faculty for only three semesters during which time she had no Vassar originated publications or grants. (R. at 1038-42.)

Papers Presented.

29. The court has found that at the time of tenure review, Dr. Fisher had delivered the following papers at professional meetings:

March 11, 1965: Fisher, C. J. and M. R. Stetten Parallel Hormonal and Dietary Induced Changes in Microsomal Inorganic Pyrophosphatase, Pyrophosphate Photophotransferase and Glucose-6-phosphatase activities. Federation Meetings, Atlantic City, NJ.

After joining the Vassar faculty:

March 8, 1980: Fisher, C. J. and R. H. Sawyer Effect of TAC on the Development of the Bursa of Fabricius in the Chick Embryo. Society for Developmental Biology N.E. Regional Conference, Marine Biological Laboratory, Woods Hole, MA.

March 27, 1980: Fisher C. J. Mechanism of Action of Vitamin A. University of Maryland.

March 8, 1981: Fisher, C. J. and R. H. Sawyer In vivo Effect of Vitamin A (Retinoid Acid) on the Development of Chick Skin. Society for Developmental Biology N.E. Regional Conference, Marine Biological Laboratory,

Woods Hole, MA.

December 28, 1981: Fisher, C. J. and R. H. Sawyer
Effect of Vitamin A (Retinoid Acid) on Chick Development in ovum. American Society of Zoologists, Dallas, TX.

March 19, 1982: Fisher, C. J., J. Gray and R. H. Sawyer
Glucocorticoid Inhibition of Scutellate Scale Development by Hydrocortisone. Society for Developmental Biology N.E. Regional Conference, Marine Biological Laboratory, Woods Hole, MA.

December 29, 1982: Fisher, C. J., J. Gray and R. H. Sawyer.
In Vitro Steroid Binding in Chick Embryonic Scales skin and Glucocorticoid Inhibition of Scale Formation. American Society of Zoologists, Louisville, KY.

March 18, 1983: Fisher, C. J. and J. Gray
Heterogeneity of Glucocorticoid Binding Sites in Avian Embryo Skin. Society for Developmental Biology N.E. Regional Conference, Marine Biological Laboratory, Woods Hole, MA.

December 27, 1983: DeCoursey, P. J. and C. J. Fisher
Circadian Timing: In Vitro Culture of the Suprachiasmatic Nucleus. American Society of Zoologists, Philadelphia. PA.

December 28, 1983: Fisher C. J. and R. H. Sawyer Beta Keratin: A Biochemical Marker for Feather Differentiation. American Society of Zoologists, Philadelphia, PA.

July 5, 1984: Fisher, C. J. and R. H. Sawyer Altered Keratinization Follows Scale Inhibition by Glucocorticoids, ESCSB Congress, Grenoble, France.

December 27, 1984: Fisher, C. J. and R. H. Sawyer Mechanism of Action of Hydrocortisone on Scale Keratinization. American Society of Zoologists, Denver, CO.

(Exh. 7I.) Dr. Fisher presented twelve papers. Drs. Hemmes, Mehaffey and Suter and Schlessman had each presented six to nine papers at such meetings. (Exh. 77B.) Dr. Norrod had one invited presentation. (Exh. 72.)

30. The Biology Department Committee noted that Dr. Fisher had been invited by the National Institutes of Health to present a paper on Morphogenesis which it conceded represented recognition "by the scientific community." (Exh. 8p. 2 para. 4.) An expert testifying at trial asserted that this kind recognition was "almost unheard of" for an assistant professor at a liberal arts college and was a great honor. (R. at 851.)

Consultantships

31. At the time of tenure review, Dr. Fisher had the following consultantship to the NSF and the NIH:

1984-85: NSF Panelist for College Science

Instrumentation Program (CSIP)

1983: NSF Workshop on government research support at small colleges

1983: NIH: Developmental Biology consultant to Dr. G. Groos at the National Institute of Mental Health

(Exh. 7I, 58C.) All of these consultantships were during her time at Vassar.

32. Drs. Hemmes, Suter, Schlessman and Norrod did not have any consultantships. Dr. Mehaffey had one consultanship, (Exh. 72, 77B, 124.)

Sabbatical Leave Activities.

33. Although the Committee agreed that Dr. Fisher's sabbatical year was productive, the members criticized her sabbatical "leave activities" claiming that she spent only brief intermittent periods in the laboratory which raised concerns "about the choices she made in respect to how to spend her leave year." (Exh. 8 p. 6, para. 2.) However, during her sabbatical, Dr. Fisher spent nine months working in the laboratory, during which time she collaborated with four different groups, submitted eight grant proposals, six of which (including two NSF grants) were funded, published one manuscript, wrote one other, served as consultant to both the NSF and the NIH and presented papers at national and international meetings. (R. at 45-47, 717-722; Exh. 7 IV B lab, 7I, 16C 57A-B, 58A-F, 61A-E, 17.) These accomplishments made her sabbatical year far more productive than those of the three males who preceded her in tenure in the Department and more than the male who

was tenured in 1987. (R. at 891-895; Exh. 65, 69, 124.) The Committee excused Dr. Mehaffey for his lack of scholarly sabbatical activity by commending him for serving on a college committee during his sabbatical leave. (Exh. 29 p.14.) Great portions of the tenure letters for each of Drs. Hemmes, (exh. 24), and Mehaffey, (Exh. 29), were devoted to excuses for their lack of scholarly results. Despite her many recent grants and publications, the departmental letter on Dr. Fisher concluded that "[t]here is no sustained indepth probing of her research problem, leaving us once again to wonder about her commitment." (Exh. 8 p.6, para. 2.) This statement stands out starkly as another demonstration of the Department's bath faith since Dr. Fisher's scholarship was superior or at least equal to the scholarship of the three men and single woman who preceded her in receiving tenure as well as the man who subsequently achieved tenure in 1987. (R. at 841-853, 1107-1113, 1142-43, 1692, 1798-99, 1820, 1833, 1859-60.) Dr. Norrod, the single woman, did not take a sabbatical prior to her review. (Exh. 72.)

Outside Evaluations.

34. The court finds that the three outside evaluators, selected to evaluate Dr. Fisher's scholarship record, evaluated her record analytically and in detail, were strongly positive on her scholarship and supported her tenure candidacy. The court further finds that their appraisals of the plaintiff's merit as a scholar were improperly ignored by the defendant college in its final determination to deny plaintiff promotion and tenure in the Biology Department. The department represented to the FASC and the Dean that Dr. Fisher's outside evaluators did not go into depth or detail about her scholarship and thus their recommendations were not of high quality. (Exh. 126.) This was a

disingenuous and pretextual criticism of these evaluations. It is clear upon a comparative reading of Dr. Fisher's outside evaluations and those submitted for the men who had been recently tenured in Biology that Dr. Fisher's evaluations were both more detailed and more unreservedly positive than those the men candidates received. (Exh. 12A-C, 25A-B, 30A-B, 33A-C.) At trial an expert testified on this issue:

> As someone who is an expert in that area, I would agree with the outside evaluators whose letters were quite clear on the issue of Dr. Fisher's research accomplishments that in fact she was a very accomplished, very independent, very well respected scientist who had contributed significantly to her own research field and showed every promise of continuing to do so in the future. (R. at 1142-43.)

35. Particularly revealing on the issue of good faith were the remarks that Dr. Mehaffey, chairman of the Department at the time of Dr. Fisher's tenure review, made to the FASC concerning Dr. Fisher's outside evaluations. Dr. Mehaffey prepared certain notes for the meeting with the FASC on May 3, 1985. He wrote that Dr. Fisher's three affirmative recommendations from the outside scholars were, "not at all analytical," and that the Committee was "in fact disgusted with their quality." (Exh. 126; R. at 1935-36.)

36. The court concludes that different standards were applied to Dr. Fisher. The court bases its conclusion not only on the strongly positive letters of support Dr. Fisher received from the outside evaluators, but also on a comparison with the outside evaluations received by the three men who were tenured prior to Dr. Fisher's review: Drs. Hemmes, Mehaffey and Suter. Not one of these men

had as favorable recommendations as Dr. Fisher had. Dr. Mehaffey had only two letters of evaluation rather than the normally required three. Dr. Hemmes and Dr. Mehaffey were each evaluated by someone who knew them personally or had been a mentor, teacher, colleague or friend, and their letters spoke from that vantage point rather that of a disinterested third party. The court's findings are as follows:

> Dr. Hemmes was evaluated by three outside evaluators. One, Dr. Eliot Stellar, a distinguished professor at the University of Pennsylvania stated that, based upon the "minor" papers Dr. Hemmes had published, he could not recommend Dr. Hemmes for promotion or tenure on the basis of his "scholarly accomplishment." Dr. Stellar further stated that Dr. Hemmes had not accomplished enough to merit his being "worthy of tenure at that time." (Exh. 25A.)
>
> The second report by Dr. Ann Sullivan at Hoffman-La Roche Co. was complimentary but brief (one-half page), not analytical and had no in-depth commentary. (Exh. 25B.)
>
> The only other evaluator for Dr. Hemmes, Dr. Hirsch, knew him personally and had collaborated with him. (Exh. 26.) Despite this, the Biology Department strongly urged the Dean to place great significance on Dr. Hirsch's recommendation. (Exh. 24 p.5.)
>
> Dr. Mehaffey was evaluated by two outside evaluators. The first, Dr. B. R. Wooten of Brown University, discussed four of Dr. Mehaffey's papers.

He was impressed with one of them but said that Mehaffey's three publications on night vision were of "little scholarly interest" and that his "publication rate had been low" but that he showed "great promise." The other Dr. Margaret Burns, was complimentary, but as Mehaffey himself noted, her evaluation was not particularly useful to the Department's review process and if he "were a member of the FASC and [] got that letter [he] wouldn't pay much attention to it." It also appears that Dr. Burns was personally acquainted with Dr. Mehaffey due to her references to him as a warm, sensitive, thoughtful human being. (Exh. 30 A-B, R. at 1943-45.) Typically mentors, friends and/or collaborators are not to write peer reviews for tenure. (See R. at 837.)

Dr. Suter was the only one of the three males evaluated by three outside evaluators, all of whom reported favorably on his work but in conclusive language. One favorable evaluation by Dr. William Eberhard of the University of Costa Rica was limited to observations on Dr. Suter's research on insects and mice. While generally complimentary, Dr. Eberhard found one of Suter's papers "weak" because "some important observations are lacking." He did not make recommendation as to tenure. A second outside evaluator, Dr. McClure, knew Dr. Suter from the University of Indiana were Dr. Suter had been a friend of the evaluator and/or a student in the evaluator's department although Dr. Suter did not work directly with her. Again, an evaluation by a person where this type of relationship exists between the evaluator and the candidate was not considered appropriate. (Exh. 33A-C.)

37. Despite the above record, Vassar's President Smith stated to Dr. Fisher that one of the reasons for her denial of tenure was that her outside "reviews were lacking strength as compared to those for other departmental decisions." (Exh. 128B p.2.) President Smith could have been taking her cue from Dr. Mehaffey's characterization of the Fisher letter as "disgusting." (See Exh. 126.) The court finds that there were no consistent standards or criteria applied for the outside evaluations. (R. at 830, 834-53, 1033-42, 1045-65, 1142, 1151.) This is further proof of the pretextual nature and bad faith demonstrated in the decision against Dr. Fisher.

38. The Court finds that the Biology Department Committee recommendation carried great weight in the subsequent deliberations of persons and committees appealed to by Dr. Fisher to reconsider the bad faith and pretextual negative recommendation concerning her promotion and tenure. A record of the FASC's meeting with the Dean and President Smith showed that there was discussion about the Department's strongly negative judgment of Dr. Fisher's research in light of the three outside evaluations which were more positive in tone than the Department's recommendations. It appeared to be of concern to the FASC that there was this disparity between the outside evaluators' and the Department's judgments. (R. at 2153.) The court finds that the FASC's, the Dean's and the President's final characterization of these outside evaluations as being superficial and not critical of Dr. Fisher's scholarship arose from points made by the Department such as Dr. Mehaffey's characterization of Dr. Fisher's evaluations as "disgusting." (R. at 2151-53, Exh. 126.)

39. It is significant that neither the President, nor any member of the FASC, nor the Dean were trained in the

natural sciences and therefore were probably more reliant on the Biology Department's recommendation than they might have been in an application for appointment in another field such as the liberal arts. (Glen Johnson Dep. 14.) The President noted that the Departmental Committee's rejection of Dr. Fisher's qualifications for promotion and tenure represented "overkill" on the part of the department. (Exh. 15.) This notation on Fisher's faculty record card made clear that the President of the College was aware of the pretextual nature of the Committee recommendation concerning Dr. Fisher, but she nonetheless went forward with the denial of Dr. Fisher's promotion and tenure.

Standards Applied to evaluate Scholarship of Tenure Candidates.

40. One of Dr. Fisher's experts said that "different standards were being used in the case of Dr. Fisher" from the "standards being used for the other faculty members being considered." (Fallding Dep. p.26.) Another stated the following:

> Dr. Fisher was very productive. There was no reason to assume that she was going to change overnight. She, despite enormous obstacles, had gone out there and gotten grants and more grants, and changed her research area and produced peer review publications and gotten collaborations and gotten consultanships. And as they say, they don't know if she's going to continue, yet when the men don't even produce a publication they say we know he's willing to make up for this in the future. It's a completely different story.
> (R. at 898.)

41. One example of many in the record which demonstrates the arbitrariness of the application of standards and criteria is represented by a sample of the cross-examination of Dr. Pat Johnson, the former chairman of the Biology Department, who drafted the scholarship portions of Dr. Fisher's negative tenure recommendation.

Q. Now on scholarship, and I'm turning now to page 3 of the report of March 28, 1979: "Mr. Hemmes has a broad scholarly interest in the nature of social communication in animals. His doctoral work centered on the maternal-infant bond and the kind of signals generated by mother and by infant which established and maintained that bond..."

. . .

Now, as of 1979, [the time of his tenure review] had Mr. Hemmes had any peer review publications while he was at Vassar?

A. Yes, he did...It was a paper entitled -- well, I don't remember the exact title, but it had to do with the reproductive capacity in Zucker genetically obese rats.

Q. And where was the paper published?

A. I believe in the proceedings for the Society of Experimental Biology and Medicine.

Q. And did he have any other papers published?

A. As I recall, he had at least one paper published before he came to Vassar.

Q. No. I'm talking about at this moment.

A. At this time, I think that was the one published paper. He had two additional papers, including the one we are referring to in this paragraph, that were submitted for publication.

Q. I want to be clear on it. He had a paper published while he was at Vassar?

A. Yes.

Q. One?

A. That's my memory, one.

Q. Now, did you write about his published works, and I'm referring to page 5: "In summary, while the quantity of his published works is not great, the quality of the papers written and of the studies completed is exceptionally fine. We are certain that Richard Hemmes possesses a keen analytical mind and a creative drive that will keep him immersed in scientific investigation throughout his career?"

A. Yes.

Q. You wrote that?

A. That's what we wrote.

Q. "The work that he completes is precisely

done, well controlled, thoroughly analyzed and properly interpreted. It should always meet with success in the peer review process."

A. Yes it is.

Q. "We must also add that he has written several grants of various kinds in search of funds to support his work, a task that is comparable to producing a manuscript."

Now what did you mean when you said that?

A. That the creative process, if you will, that goes into producing a grant request is essentially the same kind of creative process that goes into producing a manuscript. It's addressed to describing the kind of work one is going to do, rather than describing the kind of work one has done, but the intellectual input, the detail that has to be presented, the experimental design that is to be described and presented is all of the same nature and quality that goes into producing a manuscript.

Q. Would it be fair to say here, Dr. Johnson, that you were crediting him with a great deal of good scholarship because he had written a grant application even though it had not been funded or approved or thought to be excellent by his peers?

A. Well, we were crediting him with signs of

good scholarship based on not only those grant proposals that he had written, but also with the manuscripts that we had for review published--

Q. No, I'm asking about this very language here: "We must also add that he has written several grants of various kinds in search of funds to support his work, a task that is comparable to producing a manuscript."

Now right there are you saying that he should be complimented for writing these grant applications even though they were not peer-reviewed and even though in peer review they were not given a very good or excellent mark and funded?

A. I can't say what kind of mark they were given. All I can testify to is to say they were not funded. And I'm saying yes, that he should be lauded for having written these proposals, yes. (R. at 1798-1801.)

42. Similarly, when Dr. Pat Johnson was cross-examined about what the Committee said about her endorsement of Dr. Mehaffey, she was asked: "Are you saying there that he really couldn't published because he couldn't get the research funds to do his work?" She responded, "[t]hat's what we are saying, un-huh."
(R. at 1815)

43. The fact that there were no consistent standards applied in making judgments concerning promotion and tenure was doubly emphasized in the testimony of Dean

Sullivan, the Dean of Vassar College at the time of Dr. Fisher's tenure review. When asked to describe the test applied to Dr. Fisher in her tenure review in the light of Dr. Fisher's scholarship record as compared with the men who received tenure in the years immediately preceding her tenure denial, his response was:

> ...[A] tenure decision is not a quantitative analysis. It is a judgment call. It is a judgment based upon evidence as best one understands the evidence. And each case has its distinctive characteristics because each case is an individual case. There may be some matters of analogy, but beyond that, one can say very little.
>
> One is looking at the case as it is presented. One is examining the evidence presented, one is making a judgment based on that evidence, and it's not done then on a comparative basis...
> (R. at 2204.)

44. Despite Dr. Fisher's impressive record which was superior or equal to the scholarship of the four assistant professors (three men and one single woman) who received tenure between 1979 and 1985 and the one man who received tenure in 1987, the Committee stated, without any apparent basis for its conclusion, that her overall scholarship accomplishments were "mixed." (Exh. 8.) They credited her with "energy," but questioned her "independence" as a scholar and the "depth of the mastery of the field in which she was working." (Id) Based on the foregoing testimony and evidence, the court finds that these conclusions concerning Dr. Fisher's scholarship were made in bad faith, were pretextual, and represented the application of patently discriminatory standards.

Teaching.

45. Dr. Fisher's classroom performance was never directly observed by any of the five senior Biology Department members who constituted her tenure committee. (R. at 83, 1899.) Accordingly, her teaching performance assessment was based almost exclusively on student teaching evaluations.

46. The Biology Department letter of March 29, 1985, (Exh. 8), regarding Dr. Fisher's tenure heavily emphasized the student course evaluations in its commentary on Dr. Fisher's teaching record, but misrepresented the facts concerning the 24 courses taught by Dr. Fisher from 1977 to 1985. The committee selectively excluded favorable ratings and focused on the two courses in which Dr. Fisher had difficulties. (Exh. 8 p. 8 para. 4, 46 A-P, 49.)

47. In student evaluations, teachers are given a score from one to five by the students in their class, with five being the highest score. (Exh. 129A-B; R. at 84.) In addition to these evaluations, teachers receive assessments from the Student Advisory Committee ("SAC") and from a committee composed of Vassar biology majors. (R. at 89.)

48. The Dean of the Faculty, H. Patrick Sullivan, testified that a 70 percent average of fours and fives on student evaluations "would be considered a good statistic" and "in the good or superior category." (R. at 2147.) During the period that Dr. Fisher taught at Vassar, with the exception of two courses, her overall average of fours and fives was greater than 70 percent. (R. at 89; Exh. 46A-46P.)

49. The Committee reached its unfavorable conclusions

as to Dr. Fisher's teaching record by applying different standards to her than were applied to other tenure candidates. The Committee distorted the numbers by counting only fives for Dr. Fisher while counting fours and fives for the other candidates to determine student evaluation rankings. (R. at 298-99, 1146.) Additionally, the Committee emphasized a few critical comments about Dr. Fisher's teaching instead of noting the generally affirmative comments that were made by the student committees. (Exh. 46A-O.)

50. Prior to tenure review in 1985, the Dean's Office produced the student evaluations for Dr. Fisher in 21 of the 24 courses she had taught up to that point. In total, there were 411 student responses to the nine questions on the form which the students filled out. (Exh. 129A.) Dr. Fisher's teaching load was 40.2 students per semester, averaged over fourteen teaching semesters. (Exh. 46A-P, 49B, 112AB-GB; R. at 1293.) A statistical summary of the student evaluations of the 21 rated courses shows that she received the following percentages of fours and fives in the categories listed:

Availability to Students	75%
Illumination of Materials	73%
Clarity of Presentation	76%
Fairness	77%
Instructor Effectiveness	79%
Openness to Students	87%
Increased Knowledged (to Student)	87%
Mastery of Subject	88%

(Exh. 46P, 112.) Notwithstanding the above, the Committee came to the conclusion that, "Ms. Fisher has had consistent problems with clarity and her ability to illuminate

difficult materials." (Exh. 8 p.8 para. 4.)

51. Of the 21 rated courses, Dr. Fisher scored within the "excellent" or "exceptionally fine" range in thirteen courses, good in six courses, and scored low in two courses; one in 1982, the other in 1983. (Exh. 49B.)

52. Over eight years of teaching, Dr. Fisher averaged 79 percent of five to four rankings on question nine, "Overall Effectiveness of Instructor," an average well above the 70 percent level identified by Dean Sullivan as "good or superior." (R. at 2147; exh. 112.) Dr. Hemmes had 61 percent of fours and fives while Dr. Mehaffey had 68 percent. (Exh. 51D, 52A, 52E, 112.)

53. Pre-tenure, Dr. Fisher taught substantially the same number of courses as Drs. Hemmes, Mehaffey and Suter. (R. at 208.) Dr. Mehaffey had six student low-rated courses (below 60 percent fours and fives) and Dr. Hemmes had seven. Drs. Fisher and Schlessman had two such low-rated courses. Vassar did not produce a complete record on Dr. Suter. (R. at 204, 206; Exh. 46, 49B, 51A-J, 52A-H, 112AB-GB, 125.)

54. The court finds that Dr. Fisher's teaching evaluations were better than those of the three men tenured prior to Dr. Fisher's review. These candidates had all received some poor student evaluations during their pre-tenure career at Vassar. (R. at 298-99, 373-80, 1146.) However, on each occasion that one of them was evaluated unfavorably, the Committee commented on their subsequent improvement or excused the poor assessments of their teaching skills by explaining away low ratings as student reactions to the instructor's high standards or problems inherent in the course. No such comments were made about Dr. Fisher.

(R. at 1006-1019, 1823, 198, 203-07; Exh. 112AB-GB, 49B.) The Committee reported that Dr. Hemmes had fine student recommendations despite his receipt of an unfavorable student Bio-major report. (R. at 1796.) Similarly, the committee recommended Dr. Suter highly in the face of some unfavorable remarks of the student committees. (R. at 1822-25.) Dr. Mehaffey was tenured even though he received a SAC report so unfavorable that they recommended against his tenure. (Exh. 52A.)

55. Any comparison to Dr. Norrod's teaching evaluations, which were excellent, does not give a true picture of the situation. Unlike Dr. Fisher, Dr. Norrod did not carry a full teaching load of two courses a semester. Instead, Dr. Norrod taught only one course each semester for just three semesters before tenure review, averaging no more than ten students per class. (Exh. 55D; R. at 207.) Dr. Schlessman, who also scored well, taught far fewer students than Dr. Fisher had. (Exh. 125.) Fewer students in a class allowed the professor more interaction with students. This added interaction resulting from a lighter teaching load has a positive effect on the students' evaluation of the course. (R. at 1008.) Dr. Fisher's teaching load was approximately twice that of Dr. Schlessman's and four times greater than Dr. Norrod's teaching load. (R. at 106-07, 208-09.)

56. In discussing the student ratings of Drs. Hemmes, Mehaffey and Suter, the Biology Department Committee considered ratings of over 78 to 80 percent of fours and fives together, on Instructor Effectiveness,"exceptionally fine," "excellent," or "highly positive," and a rating of over 60 percent in these categories was considered "good." However, the Biology Department did not apply these same standards in its evaluation of Dr. Fisher for tenure. (Exh.

49B, 112AB-GB, 8, 24, 29, 51A-J, 52A-H.)

57. Dr. Fisher taught five sections of Bio 230 before her tenure review. Her ratings were high in four of the sections and low in one. (Exh. 46I, based on Exh. 46P.) The Department focused on the one low-rated section and dismissed the other four stating that, "[W]e certainly would not characterize the student evaluations for the 1978-79a and b, 1979-80b, and 1981-82 offerings (of Bio 230) as excellent, [but] we do regard them as good." (Exh. 8 p. 7 para. 2.)

58. However, for these four sections, Dr. Fisher scored the following percentages of fours and fives, mostly in the "excellent" range and averaged in the excellent range:

Clarity 79%, 76%, 96%, 87% (average = 84%)
Illumination 75%, 76%, 79%, 91% (average = 80%)
Instructor Effectiveness 86%, 86%, 79%, 91% (average = 85.4%)

(Exh. 32, 37, 39, 41, 46P: Summarized on Exh. 112.)

59. In these four sections, which the Committee found to be "not ...excellent," Dr. Fisher scored well over 78 percent on "Instructor Effectiveness." When the Biology Department Committee recommended Dr. Hemmes for tenure in 1979 they stated that this percentage rated his teaching ability as "exceptionally fine." (Exh. 24.) Similarly in 1980, the Biology Committee found that statistics showing an average of 83 percent of fours and fives on "Instructor Effectiveness" for Dr. Mehaffey in one course was "excellent." (Exh. 29.) It does not follow than an average of 85.4 percent for Dr. Fisher was characterized as only "good". (Exh. 8 p.7 para 2.) This, the court finds

to be further evidence of the disparate treatment accorded to Dr. Fisher by Vassar College.

60. The 1985 Biology Majors Report, dated January 25, 1985, reflected students' opinions on two courses taught by Dr. Fisher: her first time instruction of Hormonal Integration (Bio 327) and General Biology (Bio 115), both in the fall of 1984. The one page report was signed by twelve senior or junior Biology majors. (Exh. 46J.) The Biology Department's recommendation letter quoted language from this report:

> The majors report for 115 states that "all students felt that she was fair, patient and caring. However, these students thought she was not well versed in this more generalized material. She lectured primarily from the text and did little to enhance or further understanding of the subject. Some commented that she was sometimes confusing in lecture."
>
> We find ourselves distressed by this characterization of Ms. Fisher's performance in our introductory courses.

(Exh. 8 p.7 para. 1.)

61. In choosing to quote this language from the report, the Committee also chose to omit the first sentence of the report which stated,

> Cynthia Fisher was unanimously voted one of the best professors in the Biology Department, by her advanced-level "Hormonal Integration in the Mammal" class.

(Exh. 46J.)

62. Additionally, the Committee failed to report that the second time Dr. Fisher taught the elementary biology course (115) referred to above, she received the following ratings:

88% 4-5 on Instructor Effectiveness
84% on Clarity
100% on Mastery.

(Exh. 46P p.47)

63. Thus, after reviewing the record, the court finds that the males tenured while Dr. Fisher was on the Faculty were praised for their fine teaching while Dr. Fisher was criticized, although the facts on which the Committee's determinations were based (student evaluations, Biology Majors Reports and SAC Reports) revealed that Dr. Fisher's evaluations were superior to theirs. (Exh. 112AB-EB.) With respect to Dr. Norrod, a single woman who was recommended for promotion and tenure at the same time Dr. Fisher was denied tenure, there could be no adequate comparison as Dr. Norrod had completed only three semesters on the faculty before tenure review and had a light teaching load. (Exh. 41, 55.) Dr. Schlessman, tenured in 1987, also carried a teaching load half the size of Dr. Fisher's, making the comparison more difficult.

64. Just as these favorable reports of her teaching were ignored by the Committee, and thereafter by Vassar College in confirming the Committee's recommendation, and throughout Dr. Fisher's intra-mural appeal up to December of 1985, so were other reports from the Biology Majors which stated the following:

> Mrs. Fisher is able to elucidate difficult material.

(Exh. 46C, 46E.)

> She enhanced the subject matter by clarifying difficult topics from the text, yet her lectures were not derived from the textbook.

(Exh. 46 O.)

> The student evaluations of Ms. Fisher show a remarkable similarity in the answers to each specific question, and are consistently a highly positive critique.
>
> "...her lectures were clear, concise, well-organized," and, "often helped to summarize and condense material;" and "[the class]...would not have understood any of this or much cared if Ms. Fisher had not given the subject life and relevance."

(Exh. 46M.)

65. The court finds it significant that the Biology Majors Committee felt it necessary to send the Bio-Majors Report for the Spring semester 1985 (Exh. 46M), quoted above, to the Appeals Committee in Dr. Fisher's case with a cover letter from the Bio-Majors Committee which stated, "we feel it [this report] is representative of her teaching not only from last semester, but throughout her years at Vassar" (Exh. 46N.)

Additional Distortions in Vassar's Assessment of Dr. Fisher's Teaching Record

66. The Departmental letter set up new categories and standards for tenure, either not applied to the other tenure candidates, or dishonestly assessed as to those candidates and Dr. Fisher. The categories included "independent students", meaning students either not enrolled in a Biology class or enrolled in a special class so named, and the introduction of 300 level (advanced) courses in biology. (Exh. 8.)

67. The Biology Department Committee stated that Dr. Fisher had a poor record in the supervision of students in independent research. (Exh. 8 p. 10 para. 2.) This conclusion, when compared to the records of the men given tenure, underlines further the bad faith of the Biology Department concerning its recommendation that Dr. Fisher not receive promotion and tenure. The Department, in its 1979 letter to the Dean recommending Dr. Hemmes for tenure, said that publication of students' research was one of the "ultimate tests" of instruction, and predicted that his students' work would be published "in the future." (Exh. 24.) None of Dr. Hemmes' students were co-authors with him on extra-mural papers nor were any of Dr. Mehaffey's students. (Exh. 64-67.) The 1984 letter recommending Dr. Suter for tenure noted that,

> Mr. Suter has had great success in attracting students to work with him...[and] has often had three students working with him during the course of a year.

(Exh. 32.) The 1985 letter recommending against tenure for Dr. Fisher stated in part that,

> Another a aspect of teaching of great importance to the Biology Department is the supervision of student independent research....Ms. Fisher's record is poor

in this regard.

> ...Prior to this year she has had a total of five independent students and one volunteer who did research - a disappointing record. This year she has had five students which is commendable, though based on past performance, we are concerned that the present level of activity will not be sustained.

(Exh. 8 p. 10, para. 2.)

68. However, during Dr. Fisher's three tenure-track years, she had twelve independent study students, which average three students working with her in the course of a year, the standard referred to as "great success" for Dr. Suter. Including her terminal year 1985-86, she had altogether the following independent study students and assistants:

> Seven students registered in Independent Study (Bio 178, 298, or 399);
>
> Nine student research assistants on College stipend or partially supported by Dr. Fisher's NSF grant; and
>
> Four adult research assistants or high school students (not Vassar students).
>
> Two of Dr. Fisher's students were co-authors on her papers presented at national meetings.

Exh. 50; R. at 81-2, 313, 314-18, 2397-2400.)

69. The Committee further noted her failure to introduce

a 300-level (advanced) course in her area of expertise in its recommendation. (Exh. 8 p. 10 para. 3.) She was faulted for not developing "an advanced course of her own design which all other faculty had routinely done," and, accordingly, the Committee felt she did not "meet the criterion for high quality teaching at Vassar College." (Exh. 8 p.11 para. 2.) This was false both as to Dr. Fisher and as a standard applied to other tenure candidates. At trial, Dr. Mehaffey, the Department Chair, conceded that the development of a 300-level course was not a requirement for tenure. (R. at 1474.) Nonetheless, Dean Sullivan testified that this criterion, and Dr. Fisher's alleged failure to meet it, was an important consideration discussed by the FASC that reviewed the Department's negative recommendation. (R. at 2161-62.)

70. In any event, Dr. Fisher did prepare and discuss advanced course proposals with the Department Chair which were turned down, but in 1985-86, she successfully designed and taught a 300-level course, Bio 335. (R. at 243-45, 651-53, 713-14; Exh. 96A-N.)

71. It is noteworthy that the tenure recommendations of the Department for Dr. Suter, (Exh. 32), Dr. Greenwood, (Exh. 36 -- not otherwise a valid comparison to Dr. Fisher's tenure eligibility since Dr. Greenwood was hired as an Associate Professor and her review concerned her eligibility for Full Professor), and Dr. Hemmes, (Exh. 24), did not credit them with any new 300-level courses prior to tenure. This demonstrates that this criterion was not applied to these candidates at the time of their reviews. The Biology Department's letter recommending Dr. Norrod for tenure, (Exh. 39), falsely credit her with "introducing" an advanced course, Immunology (Bio 370), despite the fact reflected in Vassar College Catalogues that the same course

(same number and course description) had been taught several times in prior years by other faculty, to wit, by Dr. Karen Friedman who testified that she developed the course and the course description in the catalogue. (R. at 1260-63; Exh. 94.)

Service.

72. In the Vassar Governance, the college's basic policy document, the only qualifications stated for attaining the tenured rank of Associate Professor are scholarship and teaching. (Exh. 2 p. 35.) Thus at Vassar, service is a tertiary criterion. Although the Committee conceded that Dr. Fisher had "served the department in a number of ways," they concluded that,

> Overall then, we are not satisfied with Ms. Fisher's service to the department and feel that while her service to the college may be adequate it is in no way outstanding. We conclude that Ms. Fisher's service to the department and the college is not of sufficiently high quality for promotion.

(Exh. 8 p. 12, para. 2.) Despite this review, Vassar College's President Smith stated that Dr. Fisher's service to the College and to the Department had been "appreciated," and the FASC noted that Dr. Fisher's service was "good in quantity and quality." (Exh. 19, 14.) It is additionally significant that early evaluation by the Department of Dr. Fisher's service to the College and the Department were glowing. (Exh. 5G, 5N.) The only explanation for the change in attitude towards Dr. Fisher that the court can find is the discrimination manifested in its decisions concerning her culminating in its decision in 1985 not to promote her.

Leadership.

73. On the issue of "leadership," (defined in the faculty Handbook as a component of service, Faculty Handbook, Exhibit 3, App. VII, p.1), the Departmental Committee found "Ms. Fisher a great disappointment." (Exh. 8 p. 12 para. 3.) The Committee concluded that her problems stemmed from her "difficulty in establishing straightforward, open, trusting, collegial relationships with others in the department," and her lack of input "on matters of departmental concern." (Id.) The Committee faulted her for having a "deferential attitude." (Id.) Its members stated that even though her colleagues at NSF valued her abilities, she did not exhibit these abilities in the Biology department at Vassar, and therefore "conclude[d] that she does not satisfy the criterion for academic leadership." (Id. para. 3, 4.) Again this comment was not in accordance with two previous evaluations, one in 1977 and one in 1980, in which Dr. Fisher's collegiality, personality and cooperativeness were praised. (Exh. 5G, 5N.)

74. The court further finds on the record before it that Dr. Fisher's collegiality, personal relationships, and service to the College and to its students were more than satisfactory and that the opinions given contrary to this finding by the Biology Department were pretextual. Vassar had no legitimate cause for her termination on these grounds. (Exh. 5G, 5N, 8, 14, 19.)

75. Finally, the court finds that the Biology Department senior faculty was aware of the comparative scholarship, teaching and service records of Dr. Fisher and the other

faculty reviewed for tenure in light of the fact that the same Full Professors, Drs. Donald Williams, Marcie Greenwood, and Pat Johnson, served on almost all of the tenure review committees from 1979 through 1987. (Exh. 8, 24, 32, 43, 117.)

Curricular Balance and Tenure Structure.

76. On the issue of "tenure profile," the Department's position was that Dr. Fisher had no unique place in the department and, accordingly, should not get tenure. (exh. 8 p.13, paragraphs 2,3; R. at 1496-97.) The Biology Department had twelve tenure slots, six of which were already filled. There were three candidates for tenure during the academic year of 1984-85 (Fisher, Tucker, Norrod) and one in 1986-87 (Schlessman). (R. at 2119-22.)

77. The Department's claim that Dr. Fisher offered little that was unique to the curriculum was a distortion of the situation. (R. at 48-51, 1064; Exh. 4A, 115.) In 1982, the Biology Department Senior Faculty stated, "she [Dr. Fisher] has been filling an important niche in the Department's curricular program by teaching a large number of our student majors in critical courses in their program. Their evaluations of her are quite positive." (Exh. 5U p.6.) Moreover, Dr. Fisher's field of developmental biology was an important area of study for a modern biology department and no other member of the Department was a developmental biologist. (R. at 1147-51.) The Department did not use this excuse of curricular balance to deny tenure to Dr. Greenwood when her field of expertise overlapped with that of Dr. Pat Johnson, or when Dr. Suter's field overlapped Dr. Hemmes field. (R. at 1148-51.)

78. Nowhere in the criteria for tenure at Vassar College is it stated that "curricular uniqueness" was necessary. (See Exh. 2.) This standard was never applied to male faculty. While each member of the faculty had a curricular role and "core" courses to cover, (Dr. Fisher's track was identified upon her appointment to tenure track in 1980 (Exh. 5G)), there was considerable professional overlap in the Biology faculty's areas of expertise. (Exh. 80, 93.) Furthermore, Dean Sullivan admitted that there were discussions concerning lifting the "rigidly applied tenure ceiling" around the time of Dr. Fisher's review, suggesting that the limits on tenured faculty the Department expressed concern about were somewhat in doubt. (R. at 2174.) Accordingly, the court finds on the evidence adduced that Dr. Fisher did make unique contribution to the department and had professional skills which were useful to Vassar and that the Committee's conclusion on this issue was again pretextual and made in bad faith. (R. at 1151.)

79. Finally, it is significant that President Smith did not mention either service to the college or curricular balance as determinative factors in her 1985 letter to Dr. Fisher advising her of her termination. (Exh. 19.) It is equally significant that after the denial of tenure to Dr. Fisher, Vassar advertised three times in the journal Science for faculty to teach the courses Dr. Fisher had taught. This indicates that the faculty identified in the Department letter as potential substitutes for Dr. Fisher in all of her courses were not teaching those courses. (Exh. 8 p.13 para. 2, 97.) In 1986-87, those courses were in fact assigned mostly to male faculty, most of whom were recent hires. (Exh. 99, 100; R. at 1443, 1922.)

Promotion and Tenure of Married Women at Vassar.

80. In the 30 years prior to Dr. Fisher's tenure review, no married woman ever achieved tenure in the hard sciences (defined as Mathematics, Physics, Chemistry, Geology, Biology and Computer Science). (Exh. 82A-B, R. at 1308-12.) This information was based on the Vassar College Directory of Administration/Staff/Faculty which is published annually by Vassar College and lists each person on the faculty with that person's rank, and in parentheses lists that person's spouse, if any. Such entries for the directory are voluntarily obtained from the professor himself or herself on a form solicited annually by the College Publications Office . (R. at 2094-95.) Also consulted were faculty biography cards in the Vassar library where there are brief personal biographical files on each faculty member. (R. at 345-46, 478-79.)

Between 1956 and 1985, out of 18 single women in the hard sciences department who received at least two year contracts at the Assistant Professor rank, ten were tenured and eight were terminated or left. From 1972 on, six out of nine were tenured. from 1956 to 1985, among nine women who were apparently married (by listing a male parenthetical name in the College Directory, or otherwise checked out as married from the biographical files of the College) all nine were terminated or left. (Exh. 82A-B.) Of the eight women on the Biology faculty for a period of two years in the rank of assistant professor from 1972 to 1985, three single women were tenured and the five married women left the faculty. (Exh. 82A-B.)

81. Between 1981 and 1985, two other women, Karen

Friedman and Marlene Palmer, married at some time while on the Biology faculty at Vassar and first hired in 1977 as Assistant Professors, were terminated before achieving tenure. Proof was adduced that available married women were not advanced by the College for tenured positions through the several steps to tenure in Division III. Evidence adduced from Dr. Karen Friedman indicated that there was a policy of discouraging married women who were hired in the sciences as assistant professors from advancing to tenure. (R. at 418-22, 507-09, 1253-90, 1276-90, 1325-55, 1679-82; Exh. GB, 110, 111A-J.) In Dr. Friedman's case, she was asked to take a leave without pay in order to "qualify" for tenure. However, even after taking the leave, she was denied the opportunity of a contract which could have led to tenure. (R. at 1337-38.)

82. Dr. Palmer was an assistant professor in the Biology Department for six years. (R. at 509-12.) She wrote a letter to Dr. Fisher's Appeals Committee describing the prejudice at Vassar toward promoting or tenuring married women and how it negatively affected her -- to the point of her securing an abortion due to her fear that having a child would affect her tenure prospects. (R. at 2342-46; Exh. 109F.) There is no record that Vassar conducted any investigation into her allegations. (R. at 2347-48.)

83. Annually since 1972 the National academy of Science has published a report on Ph.D recipients at American universities which is broken down by professional discipline, gender, marital status and other factors. Three of these categories are: physical sciences (physics/astronomy, chemistry, geology or earth science), mathematics and biosciences. (Exh. 84A.) For the years 1972 to 1985, among women Ph.Ds in science, an average 45.4 percent were single in biosciences; 42.3 percent were

single in mathematics; and 43.3 percent were single in physical sciences. (Exh. 84A-B.) Thus, the majority of these female Ph.D scientists were married. Nationally more than 50 percent of the women holding Ph.D degrees in Biology are married and were married over 20 years ago. During the four year period 1980 to 1983, 160 women applied to Vassar's Biology Department for six advertised openings. (Exh. 123.) Given that the majority of women with Ph.Ds in Biology were married, this suggests that there was a pool of married women scientists from which Vassar could have selected qualified married women scientists for their tenured scientific faculty.

84. The court finds that both the notation in Exhibit 8 concerning Dr. Fisher's time out for family (she devoted "nine years (1965-74) of her life entirely to her family and to her personal life") Exhibit 8, p. 2, and the emphasis on this fact by Dr. Pat Johnson in Exhibit 14, are reflective of bias against married women.

85. Such comments on pre-Vassar personal life and life choices were not made in any letters of evaluation of other faculty. The Biology Department senior faculty again focused on this "hiatus" aspect of Dr. Fisher's life choices regarding family priorities when the Committee made its in-person presentation to the FASC Committee on May 3, 1985, regarding its reasons for rejecting Dr. Fisher's candidacy. At that meeting the Department represented to the FASC that Dr. Fisher was "out of date -- out of the field for 10 years." (R. at 2165; Exh. 14.) the reference to her being "out-of-date" implied that Dr. Fisher's scholarship was obsolete as a direct result of the period she was at home with her husband and children.

86. The hiatus in Dr. Fisher's professional career at most was a period of eight years (1966-73) and was not a total hiatus. She joined the faculty of Marist College in 1974 in the Biology Department, three years before she joined the Vassar faculty. Among Dr. Fisher's scholarly accomplishments as presented to Vassar for tenure and discussed, supra, most of her grants, publications, consultantships, professional papers and other recognized accomplishments were achieved after 1977 while she was on the Vassar faculty. (Exh. 7I)

87. The persistent fixation of the Biology Department's senior faculty on a married woman's pre-Vassar family choices reflects the acceptance of a stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist and, therefore, is not one despite much evidence to the contrary.

88. Expert testimony of Dr. Rita Simon, a distinguished professor at the American University in the Washington College of Law and the School of Public Affairs, established that in academia, married women are more productive than single women in many fields. Particularly in the "hard sciences", they are as productive as men, but are often not given the same rewards as either men or single women in terms of professorial rank. Based upon her studies of the question and a review of exhibit 82 which showed that no married woman had ever achieved tenure at Vassar in the hard sciences, she stated,

> Drawing on data from a great many universities and thousands of responses from men and women in the hard sciences, and examining the performance of

> Cynthia Fisher, versus the other people who were coming up for tenure at the same time as she did, I concluded that Vassar was discriminating on the basis of marital status.

(R. at 966.)

89. The court finds that Vassar, despite its protest that it advances the cause of women. R. at 2276, has consistently shown prejudice toward its married female faculty in the hard sciences.

90. In support of plaintiff's claim that she was discriminated against because she is a married woman, it is significant in the spring of 1985, at or about the same time Dr. Fisher was being reviewed, Pinina Norrod, originally hired by Vassar in the Biology Department in 1983 as an assistant professor, came up for tenure. Dr. Norrod, a single woman, had taught one course each semester for three semesters prior to her tenure review whereas the standard pre-tenure teaching load was two courses per semester for at least six and one-half years. (R. at 2169; Exh. 2, 72.)

91. Although the totality of Dr. Norrod's publications and grants were substantially equal in number and quality to those of Dr. Fisher (Exh. 72, 73, 78, 108A, 108BB, 108CA), her time in rank and in the Department was six years less than Dr. Fisher's and at the time of review, she had taught only one course per semester for three semesters with an average of only ten students per class, which was approximately one fourth of Dr. Fisher's teaching load of 40.2 students per semester. (Exh. 72; Exh. 55.) Furthermore, her research was narrow, specialized and

considered inappropriate for an undergraduate curriculum. (R. at 2172.) The FASC did not approve the granting of tenure to Dr. Norrod at that time. (R. at 2173; Exh. 41.) The FASC believed that her field of research (gonorrhea) might not have been an appropriate subject for undergraduate students in laboratory courses. (R. at 2172-73.) Outside evaluators for Dr. Norrod, though supportive in their recommendations for her promotion to tenure status, noted that she had a light teaching load; a "half time instruction" record, (R. at 2170, Exh. 40C p.2), that she had spent just two years and not the usual six to seven years in rank before tenure review, and therefore they would not grant tenure at their colleges. (Exh. 2 p. 37, 38, 39, 40A-D, 41, 55, 72, 73.)

92. Furthermore, the court finds that the senior members of the Biology Department were determined that Dr. Fisher be denied tenure and that Dr. Norrod be promoted and granted tenure. When it became clear subsequent to the meeting with the FASC on May 3, 1985, that there might be a question about the Department's judgment on the issue of Dr. Fisher's recommendation, the Chairman and the entire Department wrote two emotionally charged letters to the Dean, the President and the FASC. (Exh. 9C-D.)
They claimed that Dr. Fisher misrepresented facts. Specific "incorrect facts" to which the Department objected in its May 7 letter (Exh. 9D) were:

> 1) That Dr. Fisher had misrepresented to the FASC that Dr. Greenwood had served on Dr. Hemmes' tenure review Committee, arguing that M. R. C. Greenwood could not have participated in the tenure reviews of Hemmes and Mehaffey because her own tenure was not effective until 1980-81; and

> 2) That the years which Dr. Fisher had listed for tenure approvals of Drs. Hemmes (1979) Mehaffey (1980) and Suter (1984) were incorrect.

(Exh. 9C-D.) If it is not true that Dr. Greenwood was not tenured until after Dr. Hemmes' and Dr. Mehaffey's reviews, then a nontenured member of the faculty participated in both of these evaluations because Dr. Greenwood's signature is on the Biology Department's recommendations of tenure for both of these candidates. In fact, all of Dr. Fisher's information as to these matters is true and was known or should have been known to the Biology Department faculty. (Exh. 24, 29, 32.)

93. The Governance provided for a six and one half or seven year period or assistant professorship before a candidate would even be considered for a tenured appointment. (Pretrial Order, II, D (6).) The Governance provides that only under "special circumstances" may this rule be changed. (Exh. 2 p.37.) Thus, in order for Dr. Norrod to be considered for tenure prior to this time period of service, the Biology Department had to develop the need for her tenure as a "special circumstance." The Biology Department Tenure Committee seems to have persuaded President Smith to overturn the FASC's recommendation against tenure. (R. at 2174; Exh. 9C-D.) Dr. Norrod was promoted and given tenure at the same time that Dr. Fisher was unjustly denied promotion and tenure.

Affirmative Action for Married Women After 1972.

94. At trial, Dean Sullivan testified that one of his

functions as Dean was to look into the requirements of "affirmative action." (R. at 2137-38.) At the time Dr. Fisher made her original complaint to Dean Sullivan concerning the absence of tenured married women in the hard sciences, Dean Sullivan stated that he took it "seriously" as did the FASC. However, he claimed that after his investigation into the complaint, he found it to be "without merit." (R. at 2139-40.)

95. In this regard, the court inquired of Dr. Pat Johnson, a senior member of the Biology department who served as department chair for a period of nine years, concerning Vassar's program of Affirmative Action. (R. at 1548.) Dr. Johnson did not remember when such a program was set up. Dr. Johnson could not remember the issue of married women ever being discussed. Dean Dye, the present dean of the College, volunteered to find out the answer, but further testimony was never adduced on this subject. (R. at 1889-96.)

96. Dean Dye conceded that, "We do not have proof that there were women scientists who were married who are not in psychology, who received tenure during the years identified...in this complaint." (R. at 2306, 2311.)

97. Based then on this unrebutted proof, the court finds that never, in at least the 30 year period, from 1956 to 1986 has Vassar advanced, through the four steps to tenure as stated in the Governance (Exh. 2 p. 37), any woman in the six "hard" sciences (Biology, Chemistry, Geology, Mathematics, Physics and Computer Science) whose marital status was at <u>any</u> time married between hiring as assistant professor and the tenure review, and that all women tenured in the hard science departments during this period were single at all times from appointment as assistant

professor up to the grant of tenure, including all eight tenured from 1972 on, and including the three tenured in Biology. Moreover, the appropriate and available pool of applicants for positions in the science departments and particularly the Biology Department contained a large percentage of married women who would be satisfactory faculty if employed. Accordingly, this record shows an affirmative intent to deny tenure to married women in the "hard" sciences.

98. Therefore, the court finds that the denial of promotion and tenure to Dr. Fisher was the result of a pattern and practice of discrimination followed by Vassar with respect to married women in Biology.

99. Out of the five faculty who constituted Dr. Fisher's Biology Department tenure evaluation committee, two were men who were promoted in Biology while she was on the faculty. One of these men served as Department chair for Fisher's tenure review. The other three committee members, Full Professors Greenwood, Williams and Johnson, served on all the tenure review committees from 1979 to 1987 (except that neither Drs. Greenwood or Williams served on Dr. Greenwood's tenure committee in 1980). Exh. 8, 24, 29, 32, 36, 39, 43, 117.) This fact is significant because there was a continuum of senior personnel in the rulings made by the faculty as to men and women during this period and thereby a continuum of oversight as regards criteria and standards for tenure review.

100. The court further finds that the termination of plaintiff's employment resulted not from any inadequacy of her performance or qualifications or service, but from the pretextual and bad faith evaluation by Vassar of her

qualifications relative to the four men and one single woman promoted in Biology from 1979 to 1987.

Salary Discrimination

101. The court finds that Dr. Fisher was discriminated against on account of her status as a married woman as to salary from the time of her original appointment. With three years prior teaching experience, a two year postdoctoral fellowship, two doctoral and one postdoctoral publications and several grants, she was hired as a Visiting Assistant Professor of Biology in 1977 at a salary of $12,500, the minimum starting salary that year. (Exh. 7I, 102A, 113; R. at 137, 141, 389.) At the same time, Robert Suter, a male with no prior teaching experience, no post doctoral fellowship, no grants and two undergraduate publications, was hired as a Visiting Assistant Professor at a salary of 13,000. Dr. Suter specialized in animal behavior. Although his sub-specialty was different from that of Dr. Fisher, their duties and assignments in the department were comparable. Dr. Suter was put on tenure track in 1978-79. Dr. Fisher was put on tenure track in 1981-82. (Exh. 34, 68, 77, 103, 113B; R. at 381, 388-90, 2387-89.) The treatment of Dr. Fisher in comparison with Dr. Suter demonstrated salary discrimination against her on account of her gender at the time of her hiring, at the time of Dr. Suter's advancement to track and at their respective tenure decisions. There were other inequalities which support this theory as well. Dr. Hemmes received $500 over the minimum salary with only one year of teaching experience, a two-year post doctoral fellowship and one publication. He was hired at the tenure track level. (Exh.104B; R. at 391-92.) Dr. Mehaffey received $800

over the minimum salary with no teaching experience, a two year postdoctoral fellowship, no grants and two publications. (Exh. 104B; R. at 392.) Dr. Tucker, a male who received an increment of $1000 over the minimum salary and who was hired after Dr. Fisher to perform similar services in the Biology Department and who was denied tenure in 1985, had fewer qualifications than Dr. Fisher but was also paid more in salary than Dr. Fisher throughout the years he was on the Vassar faculty. (R. at 391-94, 995-97; Exh. 113.)

102. Dr. Schlessman who was tenured in 1987 was hired at $150 above the minimum salary with no teaching experience, one grant and no postdoctoral fellowship. (Exh. 113, 124.)

103. Additionally, a distinction was made between the initial salaries granted to married women as opposed to single women. Drs. Friedman and Norrod were both hired as microbiologists, had two years teaching experience and had postdoctoral fellowships. When Dr. Friedman, who was married at the time she came onto the Vassar faculty, was hired, her salary was $1000 annually above minimum. When Dr. Norrod, an unmarried female was hired, her salary was $6750 above minimum. (Exh. 104D; R. at 2385-86.)

104. The court finds that Dr. Fisher was discriminated against on account of her gender and from the time she was first hired by Vassar in 1977, in that: (a) her qualifications at hiring were stronger than those of the men when they were hired, but she was started at minimum salary whereas they were all paid above minimum salary. This was particularly true of a comparison with Dr. Tucker who was denied tenure at the same time Dr. Fisher, but who was

always paid $500 more per year than Dr. Fisher for substantially equal services; and (b) she was required to wait longer than any man before she was advanced to "tenure track," when her contract was renewed for 1981-83. (Exh. 102, 104A-C, 113, 7I, 64, 66, 68.) The Court further finds that Vassar discriminated against married women in terms of salary discrepancies.

Age Discrimination.

105. Dr. Fisher presented evidence that she was discriminated against on account of her age. Dr. Fisher testified that she was born in 1932. The other persons to whom she was compared had the following birth dates: Dr. Suter was born in 1946, and Drs. Mehaffey, Hemmes and Norrod were born in 1941. Dr. Schlessman received his B.A. in 1974, indicating that he is younger than Dr. Fisher and was probably born around 1952. (R. at 2394; Exh. 72.) Dr. Fisher also presented evidence concerning the ages of senior faculty members, Drs. Greenwood, P. Johnson and Williams. Dr. Greenwood was born in 1932 and Dr. Johnson in 1931. (R. at 2395.) Dr. Williams received his B.A. in 1955 suggesting that he was born in about 1933. (Exh. 139.)

106. The age at issue is the age at the time of tenure review. Putting the information on age together with the known tenure dates of the faculty members, the court finds that at the time of their tenure reviews the ages of the Vassar faculty members were approximately as follows:

Fisher	53
Norrod	44
Mehaffey	39

Hemmes	38	
Suter	38	
Schlessman	35	
Williams	33	
Johnson	44	
Greenwood	48	(Dr. Greenwood was hired as an Associate Professor. This was the age at which she became a full professor.)

All faculty members, except for Dr. Greenwood, were at least nine years younger than Dr. Fisher was at the time of tenure review. The court finds that this statistical evidence gives rise to an inference of age discrimination.

107. Dr. Fisher testified that a full professor in the Vassar biology department, Dr. Sue Lumb, told her that she "was too old to ever become tenured faculty." (R. at 2392.) In addition, the Biology Department represented to the FASC in a meeting concerning Dr. Fisher's tenure candidacy that she was "out of date -- out of the field for 10 years." (R. at 2165; Exh. 14.)

Retaliation Claim

108. Subsequent to leaving Vassar in May 1986, Dr. Fisher was hired at Bard College in a half-time position as adjunct faculty at a one-time salary of $5,600; a reduction from her previous salary at Vassar of $27,000. She moved her grant equipment from Vassar to Bard. (R. at 2364-65.) Dr. Fisher had difficulty in getting Dean Sullivan to sign the transfer papers for the equipment. (R. at 2365-66; Exh. 150C-E.) When the Dean finally gave permission for the transfer, he additionally gave Bard's Dean Levine, a

professional acquaintance of his, permission to keep the equipment beyond Dr. Fisher's departure from Bard. (R. at 2208-10; Exh. 136J.) When Dr. Fisher's contract was not renewed at Bard, she concluded that she had been "blacklisted" by Vassar College and that Dean Sullivan had told the Dean at Bard about her lawsuit against Vassar. (R. at 951-52.)

109. While at Bard, Dr. Fisher's performance was evaluated, although not as extensively as at Vassar, and she received very enthusiastic reviews. (Exh. 136A-G.)

110. It is clear that Dr. Fisher did not feel she could continue in her chosen field of science, and in order to minimize her damages and go on with her life she chose another field of endeavor.

111. In the fall of 1988, she was admitted to Adelphi University on Long Island where she was enrolled in a Master's program in the School of Social Work. In May 1991, she graduated with a Master's Degree in Social Work and in June, 1991, she passed her State Certification examination as a Certified Social Worker. Since that time she has been employed as a social worker at the Poughkeepsie Continuing Treatment Center, a Division of the Dutchess County Department of Mental Hygiene where she received a starting salary of approximately $29,900 per year. (R. at 442.)

C. JURISDICTION

While timely filing a claim of discrimination with the Equal Employment Opportunity Commission ("EEOC") functions as a statute of limitations, it is not a jurisdictional requirement for a Title VII suit. Zipes v. Trans World Airlines, Inc., 445 U.S. 385, 7I L. Ed. 2d 234, 102 S. Ct. 1127 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); Hallstrom v. Tillamook County, 493 U.S. 20, 27, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989), reh'g denied, 493 U.S. 1037, 107 L. Ed. 2d 777, 110 S. Ct. 761 (1990) ("In Zipes, we held that the timely filing of a charge of discrimination with the Equal Employment Opportunity Commission, as required under Title VII of the Civil Rights Act of 1964. . . was not a jurisdictional prerequisite to suit but was subject to waiver, estoppel, and equitable tolling.") But see Butts v. City of New York Dep't of Hous. Preservation and Dev., 990 F.2d 1397, 1401 (2d Cir. 1993) (district court only has jurisdiction to hear Title VII claims brought before the EEOC or reasonably related to those brought before the EEOC); Malarkey v. Texaco, Inc., 983 F. 2d 1204, 1208 (2d Cir. 1993) ("Under the ADEA an employee may not bring a discrimination claim in federal court unless she first files the charge with the EEOC").

Nevertheless, plaintiff has complied fully with the administrative prerequisites for Title VII and Age Discrimination in Employment Act ("ADEA") litigation by filing a timely complaint with the EEOC, claiming sex discrimination, age discrimination and discrimination in the terms and conditions of her employment, specifically in

terms of her salary. (R. at 2389.)

Plaintiff did not claim retaliation in the EEOC proceedings. However, the Second Circuit has determined that retaliation claims are "reasonably related" to claims already raised as to permit consideration. Malarkey, 983 F.2d at 1208 (citing Almendral v. New York State Office of Mental Health, 743 F. 2d 963 (2d Cir.(1984); Goodman v. Heublein, Inc. 645 F.2d 127, 131 (2d Cir. 1981). Therefore, the court concludes that plaintiff may amend her complaint to include a claim of retaliation.

This court has jurisdiction over the subject matter of each plaintiff's causes of action pursuant to 28 U.S.C. Sec. 1331,[5] 42 U.S.C. Sec. 2000 et. seq.,[6] Title VII of the Civil

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[5] "The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. Sec. 1331.

[6] Prior to Patterson v. McLean Credit Union, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), civil rights plaintiffs invoking district court jurisdiction in a case such as this could rely on the substantive provisions of 42 U.S.C. Sec. 1981. Section 1981 provides in relevant part, as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

However, in Patterson, the Supreme Court restricted the applicability of Sec. 1981 to the making of a contract and its

Rights Act of 1964, the Age Discrimination of Employment Act of 1967 ("ADEA"),[7] and 29 U.S.C. Sec. 206 (d) (3), the Fair Labor Standards act of 1938.[8]

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enforcement in the courts and barred its application to discrimination claims after employment pursuant to a contract commenced. Congress reversed the Supreme Court's restrictive interpretation of 1981 by its 1991 amendments to the Civil Rights Act. of 1964.

Nevertheless, because the events of this suit occurred prior to the 1991 amendments to the Civil Rights Act and because the 1991 Act is not retroactive, see Landgraf v. USI Film Products, et al., No. 92-757, 1994 U.S. Lexis 3292, at *7 (Apr. 26, 1994), the 1991 amendments do not apply here.

[7] Judge Cedarbaum previously ruled that plaintiff's age discrimination claim had been omitted in plaintiff's complaint in this court. (R. at 2391.) However, the age discrimination claim was part of plaintiff's complaint before the EEOC. It is within the court's discretion to permit amendments to the complaint. Gomes v. Avco Corp., 964 F.2d 1130, 1335, (2d Cir. 1992) ("grant of leave to amend a complaint is left to the sound discretion of the district court"). Given that plaintiff's age discrimination claim was first made to the EEOC long before trial, defendant had sufficient notice of the existence of this claim, therefore, the court concludes that plaintiff may amend her complaint to include a claim of age discrimination.

[8] Defendant argued at trial that Judge Cedarbaum had previously ruled that the claim of salary disparity was not included in the complaint filed with the Human Rights Commission (R. at 2390.) However, plaintiff's complaint before the EEOC charged defendant with "denying [her] equal terms,

D. TITLE VII - EMPLOYMENT DISCRIMINATION

One of the purposes of the Civil Rights Act of 1964 is to provide a federal cause of action for victims of employment discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities..."). See also U.S. Postal Service Bd of Governors v. Aikens, 460 U.S. 711, 716, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983) (prohibitions against discrimination as part of national policy).

1. In Tenure Decisions

At trial, defendant, through its repeated objections, argued that a university is a special employment environment in which the application of Title VII's prohibitions are circumscribed. As support for its position, defendant referred to the dicta in Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980); the Second Circuit there noted that "[a] university's

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conditions and privileges of employment and dismissing [her] because of [her] age, sex and martial status" as a violation of New York State human rights law. (R. at 2389.) Upon reconsideration, this court concludes that disparity in salary is a denial of "equal terms, conditions and privileges of employment" under Title VII. Therefore, plaintiff's salary discrimination claim was properly before the administrative body and consequently subject to trial.

Moreover, even if plaintiff's claim of salary disparity is not part of her Title VII claim, plaintiff may amend her complaint to include a claim under the equal Pay Act of 1963, 77 Stat. 56, Sec. 3, enacted as Sec. 6 (d) of the Fair Labor Standards Act of 1938, 29 U.S.C. Sec. 206 (d) (3).

prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom:" Id. at 67 (quoting Sweezy v. State of New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (Frankfurter, J., joined by Harlan, J., concurring in the result), reh'g denied, 355 U.S. 852, 2L. Ed. 2d 61, 78 S. Ct 7 (1957). Additionally, the court in Zahorik v. Cornell University, 729 F.2d 85, 92-93 (2d Cir. 1984), citing Lieberman, discussed five reasons why "tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." While the court in Lieberman recognized that "academic freedom does not include 'the freedom to discriminate,' "[9] the court, nevertheless, observed that Congress could not have intended that "courts would sit as 'Super-Tenure Review Committee[s].' " Lieberman, 630 F.2d at 67 (citation omitted).

Lieberman, however, concerned the comparison of files for the purpose of determining qualification. To that extent, Lieberman can be distinguished from the case at hand because plaintiff here, in addition to assessing qualifications, uses comparative evidence to show that the tenure process itself is a front for intentional discrimination.

Moreover, in Gibson v. American Broadcasting Cos. Inc. 892 F.2d 1128 (2d Cir. 1989), the Second Circuit limited the holding in Lieberman to the facts of that case. While acknowledging that the university may be a special setting, the Gibson court noted that the tenure files at issue in Lieberman were incomplete so as not to permit accurate

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[9] Lieberman, 630 F.2d at 67 (quoting Powell v. Syracuse University, 580 F.2d 1150, 1154 (2d Cir.), Cert. denied, 439 U.S. 984 (1979)).

comparison. Gibson, 892 F.2d at 1133. Additionally, the court in Gibson noted that the court in Lieberman merely held that the district court's exclusion of comparative evidence was not an abuse of discretion.

> Thus, Lieberman does not stand for the proposition that comparative proof otherwise relevant is inadmissible in Title VII suits. In light of the strong remedial purposes expressed in the Civil Rights Act of 1964 and the 1972 Amendments to Title VII, where Congress aimed to give courts broad discretion, in the exercise of their equitable powers, to fashion the most complete relief possible for victims of discrimination, we could hardly hold that relevant proof was inadmissible. Hence, comparative proof is generally admissible in a Title VII discrimination suit. Gibson, 892 F.2d at 1133.

Despite their reservations, the courts in both Lieberman and Zahorik acknowledged that Title VII applies equally to universities. Zahorik, 729 F.2d at 93 ("Tenure decisions are not exempt under Title VII..."). In fact, Title VII was amended specifically for the purpose of including universities and other educational institutions. In Powell v. Syracuse University, 580 F.2d 1150 (2d Cir. 1978), cert. denied, 439 U.S. 984, 58 L. Ed. 2d 656, 99 S. Ct. 576 (1978) the Second Circuit discussed the History of Title VII:

> As originally passed, Title VII of the Civil Rights Act exempted all educational institutions with respect to faculty employment practices. This

exemption had not been part of the original Senate bill, but was proposed in a substitute bill...

The Equal Employment Opportunity Act of 1972, 86 Stat. 103. Sec. 3 (1972), amended Title VII to bring educational institutions within the purview of the act. In the words of the House Report:

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees--primarily teachers--from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.

Powell, 580 F.2d at 1154 (citations omitted). The Powell court went on to observe that "far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias." Id. The Court in Lieberman distinguished Powell as concerning the renewal of a teaching contract rather than appointment to tenure. Lieberman, 630 F.2d at 64. Nevertheless, subsequently in Zahorik, the Second Circuit recognized the right of plaintiffs "to show that forbidden purposes lurk in a tenure decision...." Zahorik, 729 F.2d at 93. Moreover, in University of Pennsylvania v. E.E.O.C. 493 U.S. 182, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990), considering whether universities held a privilege against releasing

> peer review materials in tenure decisions, the Supreme Court admonished that the petitioner there could not seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.
>
> The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions.

Id. at 190 (emphasis added). In the case at hand, therefore, the tenure decisions of Vassar College are subject to the same inquiry as employment decisions challenged under Title VII by plaintiffs in other employment contexts.

2. **Standards of Proof**

Title VII's prohibition against discrimination provides, in pertinent part:[10]

> **Employer practices:**
>
> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation,

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10 42 U.S.C. Sec. 2000e-2

> terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Plaintiff's principal claims here are based on the disparate treatment theory of discrimination under Title VII. The Supreme Court very recently in St. Mary's Honor Center v. Hicks, ___ U.S. __, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993) clarified the requirements for proving a claim of disparate treatment under Title VII that were established in McDonnell Douglas, 411 U.S. 792 (1973) and refined in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).[11]

In McDonnel Douglas, the Supreme court established a three-part "order and allocation of proof in a private, non-class action challenging employment discrimination." McDonnel Douglas, 411 U.S. at 800: First, the plaintiff must establish a prima facie case of discrimination. Id. at 802. If the plaintiff establishes a prima facie case, then the burden production shifts to the employer to show "some legitimate, nondiscriminatory reason" for the employment decision. McDonnell Douglas, 411 U.S. at 802. Finally, if the defendant meets its burden, plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." McDonnell Douglas, 411 U.S. at 804.

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[11] See Hicks, 125 L. Ed. 2d at 415.

In Burdine, the Supreme Court reviewed the three-step process established in McDonnell Douglas and elaborated upon the second step. The Court held that the defendant's burden of providing a nondiscriminatory reason for its employment decision is not a burden of persuasion but a burden of production. In other words, the defendant need not prove its legitimate, nondiscriminatory reason, merely articulate it. Burdine, 450 U.S. at 256-60.

Most recently, in Hicks, the Court settled a divergence among the circuits regarding the meaning of the third prong of the McDonnell Douglas test.[12] Because the burden of persuasion is borne at all times by the plaintiff, the Court concluded that at the third prong of the test, plaintiff must not only prove that defendant's legitimate, nondiscriminatory reason is a pretext, plaintiff must prove that defendant's reason is "a pretext for discrimination." Hicks, 125 L. Ed. 2d at 421-22 (emphasis in original) The Court held that plaintiff must show "both that the reason was false, and that discrimination was the real reason." Id at 422. In other words, even if plaintiff proves that the reason proffered by defendant is a lie, plaintiff may not succeed unless she proves the ultimate question of intentional discrimination. Id. at 421.

In proving discrimination, plaintiff need not rely on direct evidence. Aikens, 460 U.S. at 717 ("District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent...."). Either direct

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[12] See Hicks, 125 L.Ed. 2d at 419.

evidence or circumstantial evidence will serve to prove discriminatory intent. Id. at 714 n. 3 ("As in any lawsuit, the plaintiff may prove [her] case by direct or circumstantial evidence").

Statistics may be part of plaintiff's case in proving discrimination. In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), a case involving systemic disparate treatment, the Supreme Court noted that "our cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." Id. at 339 (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620, 39 L. Ed. 2d 630, 94 S. Ct. 1323 (1974) (citations omitted). See McDonnell Douglas, 411 U.S. at 805 (statistical evidence may be used in proving pretext in disparate treatment case). See also Dothard v. Rawlinson, 433 U.S. 321, 330, 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977) (approving use of statistical evidence in disparate impact context); Bryant v. Intern'l Schools Services, Inc., 675 F.2d 562, 573 (3d Cir. 1982) (in disparate impact context, "statistical proof serves 'an important role' in discrimination cases and may often successfully establish plaintiff's prima facie case") (quoting Teamsters, 431 U.S. at 339) (citations omitted)).

E. BECAUSE OF SEX

Plaintiff claims that she was discriminated against "because of . . . sex." She claims that even though she was

qualified for the position, she was not promoted to the tenured position of Associate Professor while less qualified males were so promoted. Plaintiff alleges that this failure to promote her to a tenured position occurred because of her sex.

Discrimination "because of . . . sex," as used in Title VII, does not refer only to discrimination due to sex alone.

> The scope of Section 703(a) (1) is not confined to explicit discrimination based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971), cert. denied, 404 U.S. 991, 30 L. Ed. 2d 543, 92 S. Ct. 536 (1971). Plaintiff presents evidence to support two separate theories of sex discrimination. Plaintiff argues that she was discriminated against because she is a woman and because she is a married woman.

As noted above, plaintiff brings her claims under a theory of disparate treatment. The "burden of establishing a prima facie case of disparate treatment is not onerous." Burdine, 450 U.S. at 253. To establish a prima facie case of sex discrimination, plaintiff must show (i) that she is a member of a protected class; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position

remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas, 411 U.S. at 802; See Hicks, 125 L. Ed. 2d 415-16.

In establishing these criteria, however, the Court in McDonnell Douglas noted that because the facts of individual Title VII cases will vary, the specification of proof will not necessarily be applicable in all cases. McDonnell Douglas, 411 U.S. at 802 n.13. In Burdine, citing its qualification in McDonnell Douglas, the Court defined the proof required for a prima facie case in the context of a sex discrimination claim as requiring that plaintiff "prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253. See also Schwabenbauer v. Board of Ed. of City School Dist. of City of Olean, 667 F. 2d 305, 309 (2d Cir. 1981) (in order to establish a prima facie case, "a female plaintiff may show that she was treated less favorably than men in circumstances from which a gender-based motive could be inferred").

1. Discrimination Against Fisher as a Woman

Plaintiff claims first that she was not promoted to a tenure position because she is a woman and that less qualified men were subsequently promoted. Plaintiff, however, has failed to establish a prima facie case for her claim alleging discrimination based purely on sex. Plaintiff has established that she is a woman and that she was qualified for a tenured position in the Biology Department. She argues that men --

Drs. Richard Hemmes, Leathem Mehaffey, Robert Suter and Mark Schlessman -- who were less qualified or who had qualifications equal to hers were tenured either shortly before or shortly after she was denied tenure. However another woman, Dr. Pinina Norrod, who was considered for tenure at the same time as plaintiff, was awarded tenure. Moreover a man, Dr. Edward Tucker, who was considered for tenure at the same time as Dr. Fisher and Dr. Norrod, was denied tenure. These facts, along with the fact that several women sat on the tenure committee and the fact that several women had been tenured previously in the department, result in plaintiff's failure to establish a prima facie case under plaintiff's first theory of simple sex discrimination.

2. Discrimination Against Fisher as a Married Woman

In addition to her claim of pure sex discrimination, plaintiff claims that she was denied tenure because she is a married woman. See Sprogis, 444 F. 2d at 1198 (Title VII not limited to claims based solely on sex).

In Phillips v. Martin Marietta Corp., 400 U.S. 542, 27L. Ed. 2d 613, 91 S. Ct. 496 (1971) (per curiam), the Supreme Court determined that discrimination based on marital status qualifies as discrimination "because of . . . sex" under Title VII. Marietta involved a plaintiff challenging a corporation policy not to accept applications from women with pre-school-aged children while accepting applications from men with pre-school-aged children. The Court noted that the District Court had found that 75-80% of those hired for

the position sought by plaintiff were women and, therefore, that no question of bias against women as such was presented. Nevertheless, the Court held that "permitting one hiring policy for women and another for men -- each having pre-school-age children" was a violation of Title VII. Marietta, 400 U.S. at 544.

By this decision, the Court established the doctrine of "sex-plus" in Title VII cases. In other words, in certain circumstances, if sex plus some other characteristic results in discrimination against one sex, then Title VII is violated. In his concurrence, Justice Marshall explained,

> [b]y adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act, Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterization of the sexes.' Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 CFR Sec. 1604. 1 (a) (1) (ii). See Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1969). Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.

Marietta, 400 U.S. at 545 (Marshall, J., concurring) (citations omitted). When stereotypes regarding some characteristic results in disparate treatment, the synthesis of that characteristic and sex is discrimination "because of . . . sex" under Title VII.

The "sex-plus" doctrine applies to marital status. See Bryant, 675 F.2d at 573 n.18 (citing Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969), petition for reh'g denied, 416 F.2d 1257, vacated and remanded, 400 U.S. 542 (1971)) ("In what has come to be known as a "sex-plus" problem, a claim of sex discrimination may be premised upon marital status"); Sprogis, 444 F.2d 1194 (citing Marietta) ("no marriage" rule of United Airlines violated Title VII); Lansdale v. United Airlines, Inc., 437 F.2d 454 (5th Cir. 1971) (citing Marietta) (vacating prior determination that discrimination on the basis of marital status was not a violation of Title VII). If policy or stereotypes about married women result in the disparate treatment of married women, then Title VII is violated.[13]

At trial plaintiff presented evidence in support of her claim that she was discriminated against because of her marital status: 1) evidence distinguishing between departments in the "hard"[14] sciences (including the

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[13] See also EEOC Decision No. 72-1334, 1972 EEOC Lexis 43 (March 15, 1972) (no marriage policy is violation of Title VII); EEOC Decisions No. 70-38, 1969 EEOC Lexis 15, (July 14, 1969) (same).

[14] The "hard sciences" have been defined as the Departments in Division III of the Vassar College departments of instruction (Mathematics, Physics/Astronomy, Chemistry, Geology, Biology, Psychology) excluding Psychology. (Pretrial Order, II B (b) p.4; R. at 52.) Defendant disputes the claim that Psychology is not included in the hard sciences. (R. at 2217-18,

Mathematics, Physics, Chemistry, Geology, Biology and Computer Science departments) and the departments in the rest of the College; 2) evidence that traditionally the "hard" sciences faculties have been composed of men (married and single) and women (single only); 3) evidence that although married women constituted 52 percent of the women in science nationally, no married woman had ever received tenure in the "hard" sciences at Vassar. Plaintiff claims that it was her decision to be a wife, mother and a scientist before seeking tenure at Vassar that resulted in the denial of tenure application.

Part of the plaintiff's claim of sex discrimination due to her marital status involves the fact that plaintiff left formal academia for approximately eight years in order to raise a family.[15] In 1965, when plaintiff left academia, marriage

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2318.)

[15] Plaintiff's argument regarding parental leave is part of her disparate treatment claim. However, plaintiff might have sought to prove this part of her case under the disparate impact theory as well.

The theory of disparate impact under Title VII was established in Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). The Court held that absent a showing of discriminatory intent, discrimination exists where hiring requirements are neutral on their face -- requiring a high school diploma or passing a standardized test -- but 1) are not significantly related to successful job performance, 2) have a disproportionate effect on a class protected under Title VII, and 3) the jobs in question had previously been filled by whites. The

Court concluded that Congress' purpose in enacting Title VII was "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. "Griggs, 401 U.S. at 431.

In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court held that height and weights requirements for employment at an Alabama correctional facility had a impermissible disparate impact on women. Similar to a disparate treatment claim under Title VII, the Court in Dothard restated the shifting burdens of proof in a disparate impact case, as established in Griggs and Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975).

In Dothard, the court held that to establish a prima face case of disparate impact under Title VII, "a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard, 433 U.S. at 329. Subsequently, however, in Wards Cove Packing Co., Inc. v. Antonio, 490 U.S.642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989), the Court heightened the standard for a prima Facie case. While the Court noted that "statistical proof can alone make out a prima facie case, "Wards Cove, 490 U.S. at 650 (citations omitted), the Court specified the statistical comparison that must be made to establish a prima facie case. Reversing the decision of the Ninth Circuit, the Court held that

> The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified...population in the relevant labor market." It is such a comparison--

> between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs--that generally forms the proper basis for the initial inquiry in a disparate-impact case.

Wards Cove, 490 U.S. at 650-51 (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977)).

Plaintiff, here, would have had to present evidence of the number of women with children in the Department versus the number of qualified women with children in the teaching market. She also would have needed to produce evidence of the number of women who took parental leave in the Department versus the number of qualified women who have taken parental leave.

Additionally, in disparate impact cases, the Court has held that a "specific causation requirement" must be met in order to establish a prima facie disparate impact case. Quoting Watson V. Fort Worth Bank and Trust, 487 U.S. 977, 994, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988), the Court stated the law regarding causation in a disparate impact case as follows:

". . . the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . "

and family went hand in hand for women, especially for

Wards Cove, 490 U.S. at 656. Referring to the decision in Connecticut v. Teal, 457 U.S. 440, 73 L. Ed. 2d, 102 S. Ct. 2525 (1982), the Court held that a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial imbalance in the work force. As a general matter a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.

Wards Cove,490U.S.at 657 (emphasis in original).Had plaintiff presented the required evidence to show a statistical disparity necessary for the first part of a disparate impact case, the second aspect of the prima facie case would have been satisfied in that it appears that plaintiff's leave of absence was am specific reason that she was denied tenure. (Exh.8,14; R. at 1906, 2165.)

If plaintiff had established a prima facie disparate impact case, then defendant would have had to demonstrate a business justification for the disparity consisting of two components: 1) defendant's business justification and 2) the availability of alternative practices.

If defendant established the existence of a business necessity, plaintiff would have to show that other tests or selection devices, without a similarly undesirable. . . effect, would also serve the employer's legitimate [hiring] interst[s]

Wards Cove, 490 at 660.

women of plaintiff's race and class. Prior to the 1970's Women's Movement and social advances that have permitted women more freedom in shaping their private and professional lives, women who were of plaintiff's race and class rarely had children out of wedlock. Likewise, women of plaintiff's race and class who were married almost always had children. In other words, raising a family was an assumed aspect of marriage.

Subsequent to her parental leave, plaintiff returned to academia and spent nine years in academia before coming up for tenure. She claims that despite her qualifications and her progress in becoming current in her field, her absence from academia was held against her as an insurmountable barrier.

Plaintiff established a prima facie case of discrimination because of sex against her as a married woman. Plaintiff established that she is a member of a protected class -- married women. She has demonstrated that she was qualified for the tenure position for which she applied.

Finally, plaintiff has demonstrated that she was rejected under circumstances giving rise to an inference of unlawful discrimination. Plaintiff presents evidence that prior to, contemporaneous with, and subsequent to her denial of tenure, the Biology Department at Vassar College tenured only faculty members who were not married women (single women, single men and married men) and who had qualifications less than or equal to hers.

Defendant, however, rebutted plaintiff's prima facie case by articulating a legitimate, non-discriminatory reason for the tenure decision. Defendant presented evidence that Dr. Fisher's denial of tenure was based on an unfavorable evaluation of plaintiff's qualification based on Vassar College's standards for tenure.

Moreover, defendant argued that the professors who were granted tenure at the approximate time that plaintiff was denied tenure were more qualified and filled specific needs of the department.

In that Vassar College has satisfied its rebuttal burden by presenting a legitimate, non-discriminatory reason for its actions regarding Dr. Fisher, Dr. Fisher has the right to prove that defendant's reason is a pretext for discrimination.

Plaintiff has presented evidence that defendant's references to standards and Dr. Fisher's lack of qualifications according to the categories of evaluation are pretextual. Defendant claims to have evaluated Dr. Fisher's performance in three main categories -- scholarship, teaching ability and service to the College. Nevertheless, several times during the trial, witnesses for defendant admitted that the meaning and specifications of these categories are not written down so as to permit plaintiff to know what was expected of her and to give credibility to the standards as such. For example, the Department's recommendation to deny Dr. Fisher's application for tenure criticized Dr. Fisher's alleged lack of community service because she was not sufficiently vocal at departmental meetings. This requirement, however, is not

specified in any listing of tenure requirements. In Barbano v. Madison County, 922 F.2d 139, 145 (2d Cir. 1990), the Second Circuit considered as evidence of discrimination the fact that the Madison County Veterans Affairs Committee had considered a male applicant's military record and involvement in selecting him for a position over a female applicant even though neither military record nor involvement was listed as job requirement. In light of the district court findings as to the female applicant's qualifications, the court in Barbano concluded that there was sufficient evidence of discrimination for liability. In this case, given Dr. Fisher's demonstrated qualification,[16] the Department's use of unwritten standards as a basis for denying Dr. Fisher application for tenure is evidence of the pretextual nature of defendant's non-discriminatory reason.

Another indication of the pretextual nature of defendant's claim that plaintiff's denial was the outcome of the ordinary tenure process is the arbitrary nature of defendant's "standards" for review. Even if defendant has listed the specifics of each of the tenure categories, defendant's witnesses admitted at trial that there was no scale by which to weigh the various categories. As a result, in any

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[16] Among other things, she served as a pre-major and major advisor, served on committees for handicapped students and safety, and was the audiovisual coordinator for the Biology Department. (Exh. 7V.) Dr. Fisher also spent time helping a suicidal student receive counseling and supported her by visiting her in the hospital. (R. at 304-05.)

given case a candidate's teaching performance could be considered as a very important qualification in some cases and only a moderately important qualification in other cases. More to the point, the "standards" could be used as a mask to disguise discriminatory intent by allowing evaluators to arbitrarily place importance on the categories in which a less favored candidate is weak and place no importance on the categories in which a less favored candidate is strong. Not only has plaintiff proven by a preponderance of the credible evidence that defendant's legitimate, non-discriminatory reason -- the use of the tenure standards and process -- is pretextual, plaintiff, has also proven that defendant's reason is a pretext for discrimination. See Hicks, 125 L. Ed. 2d 407.

Plaintiff points to the legerdemain used by the Department to discredit her teaching performance as evidence of defendant's discriminatory intent. A tenure candidate's teaching performance is based largely on student evaluations.[17] Two types of student evaluations are

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[17] The Biology Department admitted that unfavorable student evaluations can be attributed to student reactions to factors such as problems inherent in a course or the instructor's stringent standards. In addition, an expert witness noted that the size of a class has an impact on the students' evaluation of the professor; the smaller the class, the more positive the impact. For example, Dr. Norrod, who had excellent evaluations, taught an average of ten students per class while Dr. Fisher averaged closer to forty (40). It is possible that Dr. Norrod's evaluations would not have been as positive had she carried a larger class load. These factors strongly suggest that the accuracy of student evaluation is

considered: 1) the report of the majors and 2) course evaluation.[18] In the course evaluations, students are asked to rank the professor in nine different categories[19] on a scale of one to five; one being the lowest and five being the highest.[20]

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questionable. See Lieberman v. Gant, 630 F.2d 60, 66 n. 10 (2d Cir. 1980) (student evaluations are by no means a perfect index of teaching ability).

[18] Dr. Fisher's teaching performance was based almost completely on these evaluations because her classroom performance was never directly observed by any member of the tenure committee.

[19] The categories are: 1) Increased knowledge and Understanding of the Subject Matter; 2) Clarity of Presentation; 3) Mastery of the Subject Matter; 4) Ability to Illuminate Difficult Material; 5) Openness to Student Questions or Disagreement; 6)Availability for Individual Consultation; 7) Fairness; 8) Overall Effectiveness of the Course; and 9) Overall Effectiveness of the Instructor.

[20] There was a change in the evaluation forms. Both the old and the new forms had rankings from one (1) to five (5). However, the standard for receiving a certain ranking are different. For example, a rank of a four to a five on the old form is considered high, while a five on the new form is considered outstanding. Defendant argues that the difference in these terms would generate different responses because students would be more likely to give a five if it denoted a ranking of "high" than a five if it denoted a rank of "outstanding." The student might instead give a four which is considered "superior." (R. 200-01.)

In evaluating the performance of male tenure candidates and non-married female tenure candidates, the Department considered the percentage of students ranking the "Overall effectiveness of the Instructor" in the top two positions -- as a four or a five. In evaluating Dr. Fisher's teaching performance, the department considered only the percentage of students ranking her overall effectiveness in the top position -- as a five. As a result, Dr. Fisher's percentages obviously appeared smaller, and her teaching performance appeared inferior when compared to others. A more scrupulous investigation, however, reveals that the requirements for teaching performance were applied unfairly and that the Departments tenure "standards" served as a pretext for discrimination.

Plaintiff also presented statistical evidence of defendant's discriminatory nature. In the 30 years prior to her review no woman who was married had achieved tenure in the hard sciences. For the period from 1972-1985, more than 50 percent of the women holding Ph.D in the hard sciences were married indicating that the pool of potential married women was available to Vassar College. Moreover, from 1980 to 1983, 160 women applied to the Biology Department. Given the statistics, it is more likely that the majority of these women who had applied to the Vassar Biology Department were married.

In addition to statistical evidence of discrimination against married women, plaintiff presented anecdotal evidence. A Dr. Karen Friedman testified that there was the Department's policy to discourage married women from

advancing to tenure. Dr. Friedman personally experienced this policy when she was asked to take an unpaid leave of absence in order to qualify for tenure which she never received.[21] Another woman, Dr. Palmer, felt the prejudice against married women was so strong that she had an abortion in an attempt to protect her tenure prospects. She wrote a letter to Dr. Fisher's Appeals Committee to notify them of this prejudice but no investigations were made into her allegations.

Considering plaintiff's evidence as a whole, she has succeeded in proving that defendant's proffered reasons are pretextual and that defendant intentionally discriminated against her because of sex in violation of Title VII.

F. MIXED MOTIVE

In addition to the evidence proving discrimination through inference discussed above, plaintiff presented direct evidence of discrimination which calls for a consideration of the case according to the mixed motive theory of disparate treatment.

In Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), plaintiff was an accountant who was rejected for partnership despite clear

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[21] After her leave, Dr. Friedman's contract was not renewed, denying her the opportunity to achieve tenure.

indications that she was qualified. Hopkins presented direct evidence of sex discrimination in the form of statements by evaluators that she was "macho," "overcompensated for being a woman," needed "a course at charm school," and should "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Hopkins, 490 U.S. at 235. Despite this clearly discriminatory motive, the Court also found that Price Waterhouse had legitimate complaints against Hopkins in that she lacked certain interpersonal skills and was unnecessarily abrasive in dealing with staff.[22] Hopkins, 490 U.S. at 236. The decision in Hopkins, in other words, involved both legitimate and illegitimate considerations. The Court concluded that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." Hopkins, 490 U.S. at 241. The Court noted that the purpose of Title VII was to preserve the employer's right to make independent business decisions while proscribing certain discriminatory considerations. Hopkins, 490 U.S. at 241-244. Therefore, the Court held, "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of a liability only by proving that it would have made the same decision even if

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[22] But see Note, "In Praise of Macho Women: Price Waterhouse v. Hopkins, 46 U.MIAMI L.R. 835 (1992), arguing that even the complaints regarding Hopkins' interpersonal skills that the court accepted as legitimate were actually stereotypical characterizations violative of Title VII.

it has not allowed gender to play such a role."[23] Hopkins, 490 U.S. at 244-45.

In the case at hand, plaintiff has presented evidence of a virtual smoking gun. On Dr. Fisher's faculty record card the President of the college noted that the Department's negative recommendation was "overkill" on their part. (Exh. 15.)

This notation is direct evidence that the president believed that the department's recommendation to deny Dr. Fisher's application for tenure was not made without bias. In Barbano, the Second circuit determined that an organization may be found liable for relying upon a committee recommendation that has been tainted by discrimination. Barbano, 922 F.2d at 143-45. It is clear that in this case, Vassar College did rely upon the negative recommendation of

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[23] The Civil Rights Act of 1991 modified the Supreme Court's holding in Hopkins concerning when a plaintiff is entitled to relief in a mixed motive case. As amended by the Act, Title VII provides that a plaintiff establishes an unlawful employment practice "when [she] demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. Sec. 2000e-2(m). However, under the 1991 Act, if an employer is able to establish that it would have taken the same action absent any illegitimate motive, the court is limited in the type of relief it may order. See 42 U.S.C. Sec. 2000e-5(g)(2)(B).

Nevertheless, since the 1991 Act is not retroactive, the Hopkins standard applies in the instant case.

the department in denying Dr. Fisher's application for tenure because the college-wide faculty committee gave a positive recommendation for tenure, as did Dr. Fisher's outside evaluators. Therefore, the evidence of Vassar College's knowing reliance on the Department's biased recommendation provides direct evidence of Vassar College's intentional discrimination.

Additionally, Dr. Mehaffey admitted at trial that the fact that the time plaintiff had taken off in order to raise a family was a principle factor in the Department's recommendation to deny her tenure. (R. at 1906.) He felt that this represented a huge gap in her knowledge which she was unable to rectify. (Id.) This statement was in spite of the fact that she was actively publishing and researching after her hiatus. This is also direct evidence that the Biology Department, perhaps still deeply rooted in the tradition of the hard sciences, was unable to overcome the stereotypical view of women as either scientist or wife--but not both.

Under the Hopkins mixed motive analysis, since plaintiff has proven that sex played a motivating part in the decision not to grant her tenure, defendant must prove that it would have denied her tenure even if plaintiff were not married and had not taken time to raise a family.

While defendant has argued that the tenure decision in plaintiff's case was simply the result of the tenure process, it has been unable to prove that its evaluation of plaintiff's qualifications, absent discriminatory considerations, would have been the same. This is especially true in light of the fact

that the faculty committee that was not based in the hard sciences gave plaintiff a positive recommendation as did plaintiff's evaluators from outside of the College

Therefore, since plaintiff has presented direct evidence of discrimination and since defendant has failed to prove that it would have made the same decision absent the consideration of illegitimate factors, plaintiff has successfully proven her case of discrimination by defendant because of sex in violation of Title VII.

G. AGE DISCRIMINATION

The ADEA prohibits employers from discriminating against employees who are at least 40 but less than 70 years old on the basis of their age. 29 U.S.C. Sections 621, 623, 631. It is well-established that claims under the ADEA undergo the same burden shifting analysis developed for Title VII claims in McDonnell Douglas and Burdine. Robinson v. Overseas Military Sales Corp. et al., No. 93-6211, 1994 U.S. App. LEXIS 6645, at *10 (2d Cir. Apr. 6, 1994) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985)); Gallo v. Prudential Residential Servs., No. 93-7556, 1994 U.S. App. LEXIS 9137, at *11 (2d Cir. Apr. 27, 1994). Due to the inherent difficulties in proving discrimination under the ADEA. courts have allowed plaintiff's use of statistical evidence to establish a prima facie case. See Teamsters, 431 U.S. at 339. In order to establish a prima facie case of discrimination in violation of the ADEA, a plaintiff must show (1) that she was a member of the protected group, (2) that she was qualified

for the job, and (3) that she was discharged "under circumstances giving rise to an inference of age discrimination." Stetson v. NYNEX Service Co., 995 F.2D 355, 359 (2nd Cir. 1993) (citing Hollander v. American Cyanamid Co., 895 F. 2d 80, 83 (2d Cir.1990); Pena v. Brattleboro Retreat, 702 F.2d 322, 324 (2d Cir. 1983)).

Dr. Fisher has met her burden of establishing a prima facie case of age discrimination. She was 53 years old at the time of her tenure denial, she was well qualified for the position and the statistical evidence on faculty members ages at tenure review showed that all other tenured faculty who were equally or less qualified than Dr. Fisher were at least nine years younger than Dr. Fisher when they were tenured.[24]

That some of the tenured faculty members were over 40 when they were promoted does not undercut this finding. Other courts have found an inference of age discrimination where there was a similar or lesser age differential than in the instant case. See Franz v. Raymond Eisenhardt & Sons, Inc. 732 F. Supp. 521, 526(D.N.J. 1990) (fact that discharged employee was replaced by an employee only five years younger than discharged employee did not show, as a matter of law, that discharged employee could not establish a prima facie case of age discrimination); Obitko v. Ohio Barge Line, Inc. 628 F. Supp. 62 (W.D. Pa 1986) (plaintiff established

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[24] This statistic excludes Dr. Greenwood who was five years younger that Dr. Fisher when she joined the Vassar faculty but was hired at the tenured level.

prima facie case of age discrimination even though he was replaced by an employee who was older; employee was within the protected group, was qualified, and was involuntarily discharged); but see Bost v. Holly Farms Foods Inc. 823 F. Supp. 384. 386 (W.D.N.C. 1933) (terminated employee replaced by 42-year old and 46-year old did not establish prima facie case of age discrimination because replacements were not outside the protected group).

In its defense, defendant asserts that plaintiff was denied tenure because she was not qualified for the position. However the court finds that defendant's articulated reason for denying tenure to be pretextual as set forth supra. Accordingly, plaintiff has proven that defendant has discriminated against her in violation of the ADEA.[25]

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[25] Plaintiff also presented direct evidence on this claim. In cases where plaintiff has presented direct evidence of discrimination, it is unnecessary to apply the McDonnell Douglas analysis. Grant v. Hazelett Strip-Casting Corp., 880 F. 2d 1564, 1568 (2d Cir. 1989) (citing Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2d Cir. 1980), cert. denied, 452 U.S. 940, 101 S. Ct. 3083, 69 L. Ed. 2d 954 (1981)). Rather, once plaintiff has established than an illegitimate factor played a substantial role in the employment decision, defendant has the burden of proving by a preponderance of the evidence that it would have reached the same decision without consideration of the illegitimate factor. Hopkins, 490 U. S. at 244-45.

Dr. Fisher testified that a full professor in the Vassar Biology Department told her that she "was too old to ever become tenured faculty." (R. at 2392.) Moreover, the Biology

H. EQUAL PAY ACT CLAIM

Section 206 (d) (1) of the Fair Labor Standards Act provides

in part that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which

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Department represented to the FASC in a meeting concerning Dr. Fisher's tenure candidacy that she was "out of date -- out of the field for 10 years." (R. at 2165; Exh. 14.) However, these statements do not establish, by themselves, direct evidence of an illegitimate factor. The court interprets the Department's statement to the FASC not as direct evidence that age played a part in its decision but rather as an attempt to convey that she was not up to speed in educational requirements and/or research techniques even though this is contrary to the evidence. Furthermore, Dr. Lumb's statement that Dr. Fisher was too old to be considered for tenure is not attributable to the tenure Committee's decision making process since she was not a member. This statement could be attributed to the sentiment of the Department but on its own does not meet plaintiff's burden.

> requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. Sections 206 (d) (1). "For purposes of the Act, 'equal' means 'substantially equal'; male and female jobs may be compared even if they are not identical. " Horner v. Mary Institute, 613 F.2d 706, 713 (8th Cir. 1980) (citing Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976)); see 29 C.F.R. Sections 1620.14 (1986). In order to sustain a claim under the Equal Pay Act, plaintiff must show that the jobs at issue require "equal effort, skill and responsibility, ... and are performed under similar working conditions." McKee v. McDonnell Douglas Technical Services Co., 700 F.2d 260, 263 (5th Cir. 1983), amended, reh'g denied, 705 F. 2d 776 (5th Cir. 1983); EEOC v. Altmeyer's Home Stores, Inc. 672 F. Supp. 201, 214 (W.D. Pa. 1987); 29 C.F. R. Sec. 1625.15-.18 (1986). Plaintiff has the burden of proving by a preponderance of the evidence that the jobs were essentially equal. Graham v. Texasgulf, Inc., 662 F. Supp. 1451, 1464 (D. Conn. 1987) aff'd without op. 842 F.2d 1287 (2d Cir. 1988). If plaintiff is able to show a differential in wages on the basis of sex, then defendant must show that this differential falls within one of the four exceptions to 206 (d) (1). Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 41 L. Ed. 2d 1, 94 S.'Ct. 2223 (1974); Winkes v. Brown University, 747 F.2d 792, 793 (1st Cir. 1984).

Dr. Fisher presented evidence which demonstrated that married women received less in salary than men or single women in substantially similar positions. Dr. Fisher's data compared the starting salaries of men, single women and married women relative to the minimum possible starting salary. Men with lesser qualifications than plaintiff received salary increments above the minimum wage while Dr. Fisher started at the minimum. A single female hired to teach the same course as a married female received approximately $5,000 more in salary (above the minimum wage) than the married female. She also demonstrated that the job of an assistant professor in the Biology Department is essentially the same with regard to skills required, effort involved and responsibility afforded to the instructor regardless of the specific courses being taught by that instructor.

Accordingly, the court finds that plaintiff, Dr. Fisher, has established a case under the Equal Pay Act.

Vassar has failed to present any evidence that would show that the pay disparity was based on factors other than sex. Therefore, the court finds that defendant has violated the Equal Pay Act.

I. RETALIATION

The Second Circuit has determined that retaliation claims not raised in the EEOC proceedings are "reasonably related" to claims already raised as to permit their consideration, Malarkey, 983 F.2d at 1208, and, there, this court allowed plaintiff to amend her complaint to include a

claim for retaliation despite the fact that this claim has not been raised during the EEOC proceedings. However, after hearing all the evidence concerning this issue, the court finds that Dr. Fisher's allegation of retaliation is more aptly described as a "blacklisting" or "negative reference" claim. After her termination of employment at Vassar, Dr. Fisher took a position as a Visiting Assistant Professor at Bard College. Dr. fisher alleges that the Dean of Vassar informed Bard's Dean of this discrimination action which caused Bard not to renew her employment contract. (Compl. para. 9.) In addition, Dr. Fisher testified that she felt she had been "blacklisted" by Vassar College. (R. at 951-52.)

Title VII does not provide protection concerning blacklisting claims not made part of an EEOC charge. McPartland v. American Broadcasting Companies, Inc., 623 F. Supp. 1334, 1343 (S.D.N.Y. 1985) (citing Ferguson v. Mobil Oil Corp., 443 F. Supp. 1334 (S.D.N.Y. 1978), aff'd, 607 F.2d 995 (2d Cir. 1979)). The court in Ferguson held that post-employment charges of blacklisting are outside the scope of Title VII proscriptions for two reasons; the alleged activity is not discrimination and because the activity took place after the employee's discharge, it is not an "employment practice" as required under 42 U.S.C. Section 2000e-3. Ferguson, 623 F. Supp. at 1339. But see Bilka v. Pepe's, Inc., 601 F. Supp. 1254, 1259 n. 9 (N.D. I11. 1985) (employer violates Title VII if post-employment negative references are made in retaliation for plaintiff's assertion of her Title VII rights).

Plaintiff's claim of post-employment blacklisting are

beyond the scope of Title VII. Accordingly, Plaintiff here has not stated a claim which violates Title VII.

J. REMEDIES

The remedies available under Title VII are provided for in 42 U.S.C. Sec. 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . or any other equitable relief as the court deems appropriate. . . .

The purpose of Title VII remedies is to make victims of discrimination whole. Toward this end, courts generally have wide-ranging power to fashion appropriate remedies. In Bridgeport Guardians, Inc. v. city of Bridgeport, 933 F.2d 1140 (2d Cir. 1991), cert. denied, __U.S.__, 116 L. Ed. 2d 277, 112 S. Ct. 337 (1991), a case involving the disparate impact theory of discrimination, the Second Circuit held that

> [o]nce a violation of Title VII has been established, the district court has broad, albeit not unlimited, power to fashion the relief it believes appropriate. The bounds of the court's discretion are set in part by

> Title VII's goals of preventing discrimination and achieving equal employment opportunity.

Bridgeport Guardians, 933 F.2d at 1149 (citing Teamsters, 431 U.S. at 364; Albermarle, 422 U.S. at 417; Griggs, 401 U.S. at 429-30). See also Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (court has broad but not unlimited power in fashioning remedy).

While Title VII, during the relevant period, did not permit an award of punitive damages, typically, remedies under Title VII have included retroactive promotion, back pay and attorneys' fees. Brown v. General Services Administration, 507 F.2d 1300, 1303 n.4 (2d Cir. 1974), aff'd 425 U.S. 820, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976). See e.g., Barbano, 922 F.2d at 146 (affirming award of back pay, prejudgment interest and attorneys' fee and denial of injunction to hire); Clarke v. Frank, 960 F. 2d 1146 (2d Cir. 1992) (awarding back pay, prejudgment interest and attorneys' fees).

the statute provides that

> Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. 42 U.S.C. Sec. 2000e-5(g).

In Frank, the Second Circuit determined that in order to calculate the appropriate award for back pay "the court must first ascertain the time period of the employer's liability. An employee is generally entitled to back pay from the date of [her] wrongful termination to the date the discrimination is rectified." Frank, 960 F.2d at 1151 (citing EEOC v. Enterprise Ass'n Steamfitters Local No. 638 of U.A., 542 F. 2d 579, 590 (2d Cir. 1976), cert. denied sub nom. Rios v. Enterprise Ass'n Steamfitters Local No. 638 of U.A., 430 U.S. 911, 51 L. Ed. 2d 588, 97 S. Ct. 1186 (1977)).

Under the Fair Labor standards Act, a prevailing plaintiff is entitled to back pay, liquidated (double) damages and compensation for reasonable attorneys' fees and costs. 29 U.S.C. Sec. 216 (d). Remedies for violation of the ADEA are also provided for in 29 U.S.C. Section 216. However, liquidated damages are only awarded in cases where there has been a willful violation of this act. 29 U.S.C. Sec. 626.

"A Violation is willful if 'the employer. . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " Grant v. Hazelett Strip-Casting Corp., 880 F. 2d 1564, 1571 (2d Cir. 1989) (quoting Trans World Airlines v. Thurston, 469 U.S. 111, 126, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) (citations omitted). "A showing of willfulness does not require proof of specific intent to violate the act nor may willfulness be established solely by evidence that the employer knew the ADEA was 'in the picture.' " Id. (quoting Thurston, 469 U.S. at 127). A distinction must be made between "indifference to the ADEA and negligent attempts to comply with its

dictates." Benjamin v. United Merchants and Mfrs., Inc. 873 F. 2d 41, 43 (2d Cir. 1989).

> An employer acting with indifference is one who acts without interest or concern for its employees' rights under the ADEA at the time it decides to discharge an employee; that is, without making any reasonable effort to determine whether the decision to discharge violates the law. When there is evidence in the record that the employer acted reasonably and in good faith -- even though it later turns out that employment termination violated ADEA -- double damages are not warranted. Were the rule otherwise, every ADEA violation would trigger liquidated damages, and Congress' purpose in creating a two-tiered structure of liability would thereby be contravened.

Id. (citing Thurston, 469 U.S. at 128). The court concludes that Vassar's violation of the ADEA was willful because in a disparate treatment case such as this, the employer's action was taken because of an impermissible factor and was not the result of "negligence, mistake, or other innocent reason." Heublein, 645 F.2d at 131 n. 6. In any event, even without a finding of willfulness, plaintiff is entitled to liquidated damages under the Equal Pay Act which does not require a showing of willfulness.

Plaintiff, here, originally sought to be reinstated as a member of the Vassar faculty as an Associate Professor of Biology with tenure at a salary equal to that of Dr. Suter from 1986 forward. It is unclear to the court whether Dr. Fisher

still seeks reinstatement due to her change in career and, therefore, the court requests that plaintiff indicate her present feelings on this issue. She seeks back pay in an amount equal to the salary and benefits of Dr. Suter, plus prejudgment interest on the unpaid balance of the amount owed. Plaintiff also seeks to recover her attorneys' fees and costs.

Having proven her case on the grounds of sex discrimination in violation of Title VII, age discrimination in violation of the ADEA and salary discrimination in violation of the Equal Pay Act, the court finds that Dr. Fisher is entitled to recover back pay and prejudgment interest on that amount, less any amounts earned during the period 1986 when she was discharged until present. She is also entitled to recover double damages under the Equal Pay Act and the ADEA. As plaintiff is entitled to only one monetary recovery, plaintiff is required to indicate under which theory she desires to recovery.

Plaintiff is also entitled to recover attorneys' fees and costs. A separate hearing will be held on the matter of attorneys' fees, after plaintiff's attorney has filed the required affidavit and has otherwise complied with the Second Circuit's requirements for recovering such fees, to determine the amount of attorney's fees to be awarded. Submit order on thirty days notice.

Dated: May 16, 1994
New York, New York

Constance Baker Motley
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CYNTHIA J. FISHER, Plaintiff,	:	87 Civ. 4777 (CBM)
- against -	:	**ORDER AND JUDGEMENT**
VASSAR COLLEGE	:	
Defendant.	:	

In accordance with the court's Findings of Fact and Conclusions of Law filed May 16, 1994 and in accordance with the court's findings made at the June 27, 1994 hearing on the issue of the amount of damages to be awarded to Plaintiff as well as the issue of the reinstatement of Plaintiff to the Position of Associate Professor with tenure at Vassar College, it is ordered that:

a. Plaintiff recover from Defendant pursuant to her claims under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000-e et seq. and concurrently under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 623, a sum which is the difference between the income received by Plaintiff during the period from July 1, 1986 to June 30, 1994, and the average salary of an Associate Professor in the Biology Department at Vassar, which is the sum of $256,653. Since the court has found that Defendant acted wilfully, and Plaintiff has elected to recover under the

ADEA, the amount is doubled and Plaintiff shall recover the total sum under the ADEA of $513,306.

b. Plaintiff recover from Defendant as damages pursuant to her claim of salary discrimination on account of sex under provisions of the Equal Pay Act, 29 U.S.C. Section 206 (d), for the period July 1, 1983 through and including June 30, 1986, the sum of $8,265.00 which is equal to the difference between the salary Plaintiff earned and the salary Dr. Robert Suter (a male performing similar functions to those of Plaintiff at Vassar) earned during that period. The court then adds an equal sum as liquidated damages as provided by the Equal Pay Act so that the total damages in this category is $16,530 as of June 30, 1986.

c. Thus the aggregate money judgment due Plaintif is the sum of $529,836.00.

d. It is further ordered that Defendant pay the sum of $79,969.12 into the Teacher's Annuity Funds (TIAA-CREF), in Plaintiff's behalf, which is equal to the average of the additional amounts paid into these Funds on behalf an Associate Professor in the Biology Department at Vassar College.

e. It is further ordered that Defendant pay the sum of $17,067 (being 6.65 percent of the difference between the income received by Dr. Fisher and the average income of an Associate Professor in the Vassar Biology Department during the period July 1, 1986 through June 30, 1994) into the Social security Fund in Plaintiff 's behalf.

f. Finally, the court orders that Plaintiff be

restored to the faculty of the Vassar Biology Department for a period of two years, commencing with the Fall Term of 1994, to the rank of Associate Professor with tenure, at a salary equal to the average salary of an Associate Professor in the Biology Department at Vassar. She should be allowed a period of six months to which to reestablish her laboratory at Vassar. She is to be allowed to teach an introductory or lower level course commencing in the Spring Term of 1995 and be given the remainder of the time to bring her skills in her area of expertise up to date. At the end of the two year period, Plaintiff shall be evaluated by Defendant for retention and promotion to the full Professorship track.

g. Defendant is enjoined from retaliating in any way against Plaintiff for any reason on account of this action.

h. This court retains jurisdiction over this action to insure compliance with this Order.

i. The court amends its Findings of Fact and Conclusions of Law of May 16, 1994 to include the following:

1) The court finds that the policy of discriminating against married women at Vassar College has changed and, presently, married women are hired and retained in the hard sciences departments. However, this policy change occurred after 1986, the year Plaintif was denied tenure and after she filed her complaint with the New York State Human Rights Commission. Injunctive relief as to the policy under attack here is, therefore, not warranted at this time.

2) Page 1, paragraph 1, line 1 of this court's May 16, 1994 Findings of Fact and Conclusions of Law should read "principal" and not "principle."

3) Page 99, paragraph 3, line 4 of this court's May 16, 1994 Findings of Fact and Conclusions of Law should read "Section 216 (b) not Section 216 (d)."

SO ORDERED.

Dated: June 30, 1994
New York, New York

CONSTANCE BAKER MOTLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1179, 1303, 2275—August Term 1994

(Argued: March 20, 1995 Decided: September 7, 1995)

(Amended: December 14, 1995)

(Argued In Banc: June 5, 1996 Decided: June 5, 1997)

Docket Nos. 94-7737, 94-7785, 94-9125

CYNTHIA J. FISHER,

Plaintiff-Appellee-Cross-Appellant,

—v.—

VASSAR COLLEGE,

Defendant-Appellant-Cross-Appellee.

Before:

NEWMAN, *Chief Judge*, and KEARSE, WINTER, MINER, MAHONEY,* WALKER, MCLAUGHLIN, JACOBS, LEVAL, CALABRESI, CABRANES and PARKER, *Circuit Judges*.

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* The Honorable J. Daniel Mahoney, who participated in the oral argument of this appeal, died on October 23, 1996, and took no part in the final disposition of the case.

Appeal from a judgment of the United States District Court for the Southern District of New York (Motley, *J.*), finding that defendant Vassar College discriminated against plaintiff Cynthia Fisher in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d)(1), and awarding plaintiff an aggregate money judgment of $626,872.12, plus attorneys' fees.

A panel of this Court reversed the judgment of the district court. Having heard argument in banc, a majority of the Court voted to limit in banc consideration to the question whether a prima facie case of discrimination, coupled with a sustainable finding of pretext, either bars or substantially restricts appellate review of a plaintiff's verdict, as implied in *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995). We hold that there is no rule of law barring review for clear error and reject any implication in *Binder* to the contrary.

The judgment of the district court is reversed.

ELEANOR JACKSON PIEL, New York, NY (Herma Hill Kay, Berkeley, CA, on the brief), *for Plaintiff-Appellee-Cross-Appellant Cynthia Fisher.*

MAURICE F. CURRAN, Mount Kisco, NY (James P. Drohan, Daniel Petigrow, Anderson, Banks, Curran & Donoghue, Mount Kisco, NY, on the brief), *for Defendant-Appellant-Cross-Appellee Vassar College.*

(Samuel A. Marcosson, Attorney, C. Gregory Steward, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Equal Employment Opportunity Commission, Washington, DC, *for amicus curiae Equal Employment Opportunity Commission*.)

JACOBS and LEVAL, *Circuit Judges*, with whom Judges Miner, Walker, McLaughlin, and Parker join**:

At the close of a three-week bench trial, the United States District Court for the Southern District of New York (Motley, *J.*), found that defendant Vassar College ("Vassar") discriminated against plaintiff Cynthia Fisher in denying her tenure as a professor in its biology department. *Fisher v. Vassar College*, 852 F. Supp. 1193 (S.D.N.Y. 1994). Specifically, the district court found that Vassar discriminated against the plaintiff (i) on the basis of her status as a married woman, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; and (ii) on the basis of her age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"). The district court also found that Vassar had violated the Equal Pay Act, 29 U.S.C. § 206(d)(1), by paying its junior female faculty members less than its junior male faculty members. Vassar was ordered to pay Fisher an aggregate money judgment of $626,872.12, plus attorneys' fees, and to

** Judge Calabresi concurs in Parts II(a), II(b), (II)(c), II(d), and (IV) of this opinion.

reinstate Fisher to the rank of Associate Professor in Vassar's biology department.

A panel of this Court found the district court's ruling clearly erroneous and reversed the judgment. *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1996). During consideration of the Petition for Rehearing in Banc, a question was raised whether our review for clear error violated a rule established in *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995). A majority of the Court has decided to limit in banc review to resolution of the question whether a finding of liability under Title VII, supported by a prima facie case and a sustainable finding of pretext, is subject to review for clear error.[1]

No rule of law forbids appellate review for clear error in these circumstances. We hold that once an employer has proffered a non-discriminatory reason for an adverse employment action, a plaintiff in a discrimination case must show by a preponderance of the evidence that the reason for the adverse employment action was illegal discrimination. In so doing, a plaintiff may rely on the evidence constituting the prima facie case, together with supportable inferences to be drawn from the false or erroneous character of the employer's proffered reason for the adverse action. Because of the special meaning given by the Supreme Court to prima facie proof in this area of law, evidence constituting a prima facie case prior to the employer's proffer of a reason, coupled with the error or falsity of the employer's proffered reason may—or may not—be sufficient to show illegal dis-

[1] The Equal Employment Opportunity Commission was granted permission to appear as *amicus curiae* in support of the plaintiff. Oral argument was heard on June 5, 1996. Although the panel stayed the mandate of the panel decision pending rehearing, the panel's opinion was not vacated.

crimination by a preponderance of the evidence. But in any event, a finding of discrimination, like any other determination of fact, is reviewable on appeal for clear error. The panel scrutinized the district court's findings of discrimination, found them insupportable, concluded that Fisher had failed to show by a preponderance of the evidence that Vassar had discriminated against her for an illegal reason, and therefore reversed the finding of discrimination as clearly erroneous. We conclude that the panel was within its powers in reviewing the district court's finding of discrimination for clear error in these circumstances, and we therefore direct the district court to dismiss the plaintiff's suit.

I

The facts of this case are fully described in the panel opinion, 70 F.3d 1420, and in the opinion of the district court, 852 F. Supp. 1193. The following brief outline of facts assumes familiarity with those opinions. Plaintiff Cynthia Fisher is a married woman who received a Ph.D. in Zoology from Rutgers University in 1963 and engaged in post-doctoral research from 1963 to 1965. From 1966 to 1974, the plaintiff devoted most of her time to raising her two children, and performed no work outside the home. From 1974 to 1976, the plaintiff took a part-time position as a lecturer in biology at Marist College.

Fisher was hired by Vassar as a visiting assistant professor in biology in 1977, and was placed in a tenure-track position in 1980. In 1982, Fisher was reappointed for a three-year term, at the end of which she was to be reviewed for tenure. During the 1984-85 academic year, Vassar undertook a comprehensive review of Fisher's

candidacy for tenure. A five-member committee of tenured professors in the Biology Department, three men and two women, were charged with reviewing Fisher's credentials in accordance with four criteria: scholarship, teaching ability, leadership, and service to Vassar. In a confidential report, the committee found Fisher deficient in all four categories, and unanimously recommended that she be denied tenure. The committee's report and recommendation was forwarded to Leathem Mehaffey, chairman of the Biology Department, who informed Fisher of the committee's recommendation on March 29, 1985.

In accordance with Vassar's procedures, the departmental report and recommendation was also received by the dean of the college, the college president, and the Faculty Appointments and Salary Committee ("FASC"). (At Vassar, the dean, the president, and the FASC each make a recommendation to the Board of Trustees, the entity with the authority to grant or deny tenure.) Between April 19 and May 16, 1985, the FASC, the dean, and the Biology Department committee corresponded about Fisher's candidacy. On May 16, 1985, all five members of the FASC voted against tenure; the dean and the president concurred. Acting on these recommendations, the Vassar Board of Trustees denied Fisher tenure. In the same round of evaluations, one professor (Pinina Norrod) was granted tenure in the Biology Department, and one professor (Edward Tucker) was denied tenure. Fisher's appeal to Vassar's Faculty Appeals Committee was rejected, and she left Vassar in May 1986.

On July 7, 1987, Fisher filed her complaint in the Southern District of New York, alleging that Vassar discriminated against her on the basis of her sex. She sub-

sequently amended her complaint prior to trial to allege discrimination on the basis of her sex conjoined with her marital status. At the close of Fisher's case, she again amended her complaint to include a claim for discrimination on the basis of age, and to add a claim under the Equal Pay Act.

After trial, the district court found that the non-discriminatory reasons proffered by Vassar for denying Fisher tenure were pretextual, a ruling that the panel opinion concluded was not clearly erroneous. The district court went on to find that the real reasons for denying Fisher tenure were discrimination based on age and on sex plus marital status. The panel opinion held that that finding was clearly erroneous, reversed and directed that the complaint be dismissed.

II

We have limited our in banc consideration to resolution of whether a finding of discrimination that is based on a prima facie case and a supportable finding of pretext may be reversed on appeal as clearly erroneous, or whether such a finding of discrimination must be upheld absent some quantum of evidence that the employer took the adverse action for some other non-discriminatory reason. Several well-established principles of law lead us to conclude that a finding of discrimination is reviewed for clear error like any other factual determination, and thus may be reversed—even if there is a sustainable finding of pretext—if the evidence, considered in the aggregate, will not support a finding by the district court that the reason for the adverse employment action was intentional discrimination.

We begin with the statutes. Title VII makes it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The ADEA has an analogous provision that prohibits an employer from taking an adverse employment action "because of [an] individual's age." *See* 29 U.S.C. § 623. The Supreme Court has held that a claim under Title VII may arise if an employer discriminates against an individual because of sex plus another characteristic, such as marital or parental status. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (employer discriminated against women with preschool age children).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court established an "allocation of the burden of production and an order for the presentation of proof in Title VII" cases. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). We also apply the *McDonnell Douglas* framework in cases arising under the ADEA. *See Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). Under the Supreme Court's ruling, a plaintiff alleging violation of the discrimination statutes makes out a prima facie case by showing membership in a protected class, qualification for the position, an adverse employment action, and the ultimate filling of the position by a person not of the protected class. *McDonnell Douglas*, 411 U.S. at 802; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). "The burden of establishing a prima facie case . . . is not onerous." *Burdine*, 450 U.S. at 253. In fact, the plaintiff's burden of establishing a prima facie case has been frequently described as "minimal." *St. Mary's*,

509 U.S. at 506; *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (quoting *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988).[2]

"Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254. The presumption means that, unless the defendant comes forward with a non-discriminatory reason for the action complained of, the plaintiff's case may go to the jury, even though the prima facie case might be insufficient—apart from the presumption—to meet the plaintiff's ultimate burden of showing discrimination; indeed, in such a circumstance the jury must rule for the plaintiff unless the employer submits evidence that places in doubt the facts underlying plaintiff's prima facie case (such as plaintiff's qualification for the job), or furnishes a satisfactory explanation for its inability to tell the reason why plaintiff was disfavored. *See St. Mary's*, 509 U.S. at 509. "Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.' " *Id.* at 506-07 (quoting *Burdine*, 450 U.S. at 254). The purpose of the *McDonnell Douglas* framework is to force the defendant to give an explanation for its conduct, in order to prevent employers from simply remaining silent while the plaintiff founders on the difficulty of proving discriminatory intent. *See Burdine*, 450 U.S. at 254-56 & n.8.

"It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of

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[2] *See infra* note 7 (collecting cases).

persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *St. Mary's*, 509 U.S. at 507 (quoting *Burdine*, 450 U.S. at 253) (alteration in *St. Mary's*). Any legitimate, non-discriminatory reason will rebut the presumption triggered by the prima facie case. Thus, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons" in order to nullify the presumption and obligate the plaintiff to satisfy the burden of proof. *Burdine*, 450 U.S. at 254; *see also Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978) (employer need only "explain[ ] what he has done" (internal quotation marks and citation omitted)). If the defendant articulates a non-discriminatory reason, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255 (footnote omitted).

At that point, "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant." *St. Mary's*, 509 U.S. at 510. The Supreme Court warns us not "[t]o resurrect it later":

> The presumption, having fulfilled its role of forcing the defendant to come forward with some response, *simply drops out of the picture*. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]."

Id. at 510-11 (quoting *Burdine*, 450 U.S. at 253) (alteration in *St. Mary's*; emphasis added); *see also Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (2d Cir. 1994) ("[T]he burden of persuasion as to discrimination is on the plain-

tiff; the presumption that triggered the defendant's burden of production has 'drop[ped] out of the picture.' " (quoting *St. Mary's*, 509 U.S. at 511)); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993) ("[I]f a defendant carries its burden by producing a non-discriminatory motive, 'the McDonnell Douglas framework—with its presumptions and burdens—is no longer relevant.' " (quoting *St. Mary's*)). In particular, the presumption of discrimination that was raised upon a showing of the prima facie case no longer operates. *See St. Mary's*, 509 U.S. at 507; *Burdine*, 450 U.S. at 255-56 & n.10. The plaintiff then has the opportunity to demonstrate " 'that the proffered reason was not the true reason for the employment decision,' *and that race was*." *St. Mary's*, 509 U.S. at 507-08 (quoting *Burdine*, 450 U.S. at 256) (emphasis added). Of course, the plaintiff "retains that 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.' " *Id.* at 508 (quoting *Burdine*, 450 U.S. at 256) (alteration in *St. Mary's*). The question becomes the same question asked in any other civil case: Has the plaintiff shown, by a preponderance of the evidence, that the defendant is liable for the alleged conduct?

(a) *The effect of a prima facie case under Title VII or ADEA*. As the foregoing discussion demonstrates, the term prima facie case, as used in Title VII and ADEA actions, has a meaning that is quite different from and more limited than that ascribed to the term in many other actions. Such a limited prima facie case does not necessarily have much force in showing discrimination.

"Prima facie case" denotes what evidence a plaintiff must offer to avoid dismissal after presentation of the plaintiff's direct case. Except as to causes of actions for which special rules have been adopted, to satisfy the

requirements of the prima facie case the plaintiff must present evidence from which a factfinder could reasonably find every element that the plaintiff must ultimately prove to prevail in the action. Thus, in the absence of a special policy-based rule similar to that promulgated by *McDonnell Douglas*, a plaintiff avoids a directed verdict only by establishing a prima facie case that assures that at the end of the trial there will be enough evidence to support a verdict in his favor (unless the defendant's evidence conclusively undermines some element of plaintiff's prima facie case).

Because of the Supreme Court's adoption of a particular framework in *McDonnell Douglas* and *Burdine*, the same is not true of a discrimination case: a plaintiff alleging discrimination can satisfy the prima facie case and avoid dismissal at the conclusion of the plaintiff's direct case *without* submitting evidence sufficient to support a finding in his favor on each element that the plaintiff must ultimately prove to win. The burden-shifting presumption excuses the plaintiff *at that stage* from showing that discrimination was present and caused the adverse employment action plaintiff suffered. If the plaintiff submits evidence of the minimal elements of the special discrimination prima facie case—membership in the protected class, qualification, adverse employment action, and preference for someone outside the protected class—the remaining elements (discrimination and causation) are presumed *at this stage* of the litigation, and defendant must take up the burden of going forward.

But as *Burdine* and *St. Mary's* make clear, the presumption disappears once the employer has proffered a reason. When the presumption drops away, plaintiff's burden is enlarged to include every element of the claim. Discrimination and cause are no longer presumed. To

sustain the burden of putting forth a case that can support a verdict in his favor, plaintiff must then (unlike the prima facie stage) point to sufficient evidence to reasonably support a finding that he was harmed by the employer's illegal discrimination.

Accordingly, discrimination cases differ from many areas of law in that under the *McDonnell Douglas* burden-shifting framework a plaintiff's satisfaction of the minimal requirements of the prima facie case does not necessarily mean, even if the elements of the prima facie case go unchallenged, that plaintiff will ultimately have sufficient evidence to support a verdict on each element that plaintiff ultimately must prove to win the case.

It can be readily seen, furthermore, that the essential elements of this diminished, minimal prima facie case do not necessarily support a reasonable inference of illegal discrimination. In our diverse workplace, virtually any decision in which one employment applicant is chosen from a pool of qualified candidates will support a slew of prima facie cases of discrimination. The rejected candidates are likely to be older, or to differ in race, religion, sex, and national origin from the chosen candidate. Each of these differences will support a prima facie case of discrimination, even though a review of the full circumstances may conclusively show that illegal discrimination played no part whatever in the selection.

By this passage we do not mean to suggest that illegal employment discrimination is rare. We recognize, furthermore, that in the direct case, the evidence adduced to satisfy the prima facie standard may also amount to a powerful showing of discrimination; plaintiff's evidence of discrimination may also be powerfully strengthened by what the defendant puts forth in its case. The point we make here is that evidence sufficient to satisfy the

scaled-down requirements of the prima facie case under *McDonnell Douglas* does not necessarily tell much about whether discrimination played a role in the employment decision. The fact that a plaintiff is judged to have satisfied these minimal requirements is no indication that, at the end of the case, plaintiff will have enough evidence of discrimination to support a verdict in his favor.

(b) *The effect of a showing that the employer's reason was pretextual.* A showing that the defendant's proffered reason for the adverse employment action is not the real reason may serve as evidence that the defendant intentionally discriminated. We attach the label "pretext" to a proffered reason that is not credited by the finder of fact. But the label "pretext" does not answer the question: pretext for what? In some cases, an employer's proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. For example, a member of a tenure selection committee may support a protegé who will be eligible for tenure the following year. If only one tenure line is available, that committee member might be inclined to vote against tenure for a junior faculty member who is *currently* eligible for tenure, thereby ensuring that the tenure line remains open. Any reason given by the committee member, other than the preference for his protegé, will be false. Furthermore, recommenders and decision-makers who are governed by such considerations will not advise the president and regents of the institution that their recommendation or vote was disingenuous. In short, the

fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff. *See Wallace v. SMC Pneumatic, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997) (Posner, C.J.) (listing various non-discriminatory reasons for an employer's pretextual explanation).[3]

Where (as at Vassar) there are multiple recommenders or decision-makers, and where the employment decision is the result of deliberation or politicking among those recommenders or decision-makers, the problem is all the more complex. Because there are numerous participants in the decision-making process, each potentially having individual reasons for rejecting a plaintiff, there is a greater likelihood that some of those reasons will differ from the reason officially given by the institution.[4]

The sufficiency of the finding of pretext to support a finding of discrimination depends on the circumstances of the case. This is an unremarkable principle: the sufficiency of any evidentiary finding depends on the other findings and evidence that accompany it. What is at

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[3] *See also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-61 n.3 (1st Cir. 1994) (noting possibility of other reasons); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) ("Showing that the employer dissembled is not necessarily the same as showing 'pretext *for discrimination*'. . . . [I]t may mean that the employer is trying to hide some other offense."); *Benzies v. Illinois Dep't of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987) ("[S]ome less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—[may] actually account[ ] for the decision.").

[4] Chief Judge Newman's dissent asserts that the fact of multiple decision-makers should not insulate decisions permeated by the discrimination of individual participants. This is surely correct, but it misses our point. The involvement of multiple decision-makers increases the likelihood that the institution's stated reason may differ from the true reasons held by some of the decision-makers—without necessarily increasing the likelihood that discrimination played any role in their decision.

issue is the drawing of inferences from human behavior. Once the trial has moved to the stage at which the plaintiff must prove discrimination by a preponderance of the evidence, a defendant's false statements are nothing more than pieces of circumstantial evidence, which may be employed, as in many other types of cases, to reveal the speaker's state of mind. To the extent that an actor in defendant's position is unlikely to have proffered a false explanation except to conceal a discriminatory motive, then the false explanation will be powerful evidence of discrimination. On the other hand, if the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent. And if, on examination of the circumstances, there are many possible reasons for the false explanation, stated or unstated, and illegal discrimination is no more likely a reason than others, then the pretext gives minimal support to plaintiff's claim of discrimination.

(c) *The combined effect of a prima facie case and a finding of pretext.* We have seen that, while a prima facie case and a finding of pretext may in some cases powerfully show discrimination, neither one necessarily gives plaintiff much support in discharging his obligation to prove that he was the victim of discrimination. Indeed, the combined effect of both may have little capacity to prove what the plaintiff has the ultimate burden of proving. Thus, a finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination. *See Hargett v. National Westminster Bank, USA*, 78 F.3d 836, 838 (2d Cir.) (quoting *Burdine*, 450 U.S. at 253), *cert. denied*, 117 S. Ct. 84 (1996); *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir. 1995)

("plaintiff must show that the defendant's articulated reason for its decision is in fact a pretext for discrimination"); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995) ("An employer's reason for termination cannot be proven to be a pretext for discrimination unless it is shown to be false *and* that discrimination was the real reason.").

A finding of pretext, therefore, does not insulate from appellate review the ultimate finding of discrimination. To permit a plaintiff to win a judgment upon a finding of pretext, without subjecting that judgment to clear error review, would impermissibly shift the burden of proof to the defendant to disprove discrimination or to offer evidence of a "third" reason. The Supreme Court has admonished, however, that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *St. Mary's*, 509 U.S. at 514-15. Once again: "*McDonnell Douglas* does *not* say . . . that all the plaintiff need do is disprove the employer's asserted reason. In fact, it says just the opposite: '[O]n the retrial respondent [plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection *were in fact a coverup for a racially discriminatory decision*.' " *Id.* at 517 (quoting *McDonnell Douglas*, 411 U.S. at 805) (emphasis in *St. Mary's*).

Accordingly, a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext *for discrimination*, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction—or both.

And the Supreme Court tells us that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515 (emphasis added). We have recognized again and again that a plaintiff does not necessarily satisfy the ultimate burden of showing intentional discrimination by showing pretext alone.[5] A finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence.

The role of the appellate court is no different in reviewing a finding of discrimination than it is in reviewing any other finding of fact:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, *of course*, to appellate review—which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a).

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[5] *See, e.g., Quaratino*, 71 F.3d at 64 (plaintiff must show that proffered reason was "false *and* that discrimination was the real reason"); *Woroski*, 31 F.3d at 109 (to defeat summary judgment, plaintiff must show material fact as to whether "(1) the employer's asserted reason for discharge is false or unworthy of belief *and* (2) more likely than not the employee's age was the real reason for the discharge"); *DeMarco v. Holy Cross High School*, 4 F.3d 166, 170 (2d Cir. 1993) ("[T]he mere fact that a defendant [at trial] proffers a false reason for a challenged employment action does not necessarily establish liability."); *Saulpaugh*, 4 F.3d at 142 (A "Title VII plaintiff does not necessarily meet its burden of persuasion by convincing the factfinder that the employer's non-discriminatory explanation is not credible; rather, the trier of fact must find that the plaintiff has proven its explanation of discriminatory intent by a fair preponderance of the evidence.").

Id. at 524 (citation omitted) (emphasis added). This passage is underscored by the Court's parenthetical phrase "of course," which denotes that the principle of clear error review is "certain" and "unquestionable," "as might be expected," "natural," and "obvious," and thereby furnishes a background assumption for reading other passages in the opinion. Specifically, that background assumption illuminates certain passages that (like the block-quoted passage) deal with the factfinder's ability to find discrimination once pretext is shown, but do not reiterate the caveat that such a finding is subject to the ordinary rules of appellate review as a matter "of course." Thus, elsewhere in *St. Mary's*, the Court states "[e]ven though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." *Id.* at 511 n.4. Such passages do not restrict our power and responsibility to review a finding of discrimination for clear error in the usual course: even if we find that the plaintiff has made out a prima facie case and has shown pretext, we still must review a trial court's determination that the defendant intentionally discriminated for clear error.

In sum, a supportable finding of pretext and a prima facie case do not alter our ordinary standard of review for clear error, or constrain us to conclude that the defendant has intentionally discriminated:

> The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.

Id. at 524 (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)). If *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995), is read as inconsistent with this holding, we expressly reject it. Accordingly, we may reverse a district court's finding of discrimination—even if accompanied by a supportable finding of pretext—if we are firmly convinced, as the panel was here, that a mistake has been made and that the plaintiff has failed to establish intentional discrimination by a preponderance of the evidence.

Two of the three other circuits that have considered this issue have arrived at the same conclusion.[6] Furthermore, of the various opinions filed herewith, none except Judge Winter's disagrees with the central proposition of this Point II—which is that a prima facie case meeting the minimal standard of *McDonnell Douglas* (even where elements are acknowledged by the defendant), together with a finding of pretext, do not necessarily add up to a sustainable case of discrimination.

(d) *Some comments on the dissenting opinions.* (i) Chief Judge Newman's dissent is based largely on his surprising view, shared by Judge Winter, that the prima facie case of discrimination specified in *McDonnell Douglas* is as strong as any conventional prima facie

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[6] The Fifth Circuit, sitting in banc, recently held by a vote of 16-1 that in order to prevail under the ADEA, a plaintiff must show evidence that the employer was not motivated by the proffered reasons *and* that age was a determinative factor. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (in banc). Likewise the First Circuit has held that a prima facie case and evidence of pretext are not necessarily sufficient to withstand summary judgment in favor of the defendant. *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1958 (1995). *Cf. Sheridan v. E.I. Dupont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (in banc).

case. This position is squarely contrary to the broadly accepted view that, in discrimination cases under the law propounded by the Supreme Court, plaintiff's burden to produce a prima facie case is substantially less onerous than the conventional obligation to produce evidence that reasonably supports a finding on all the elements of the claim. If the requirements of a prima facie case under the discrimination statutes were no less onerous than is normally the case, the Supreme Court, and our Court, along with other circuits would not have said over and over again that the requirements of the prima facie case of discrimination under *McDonnell Douglas* are "minimal."[7]

Judge Newman's view comes from his highly selective misreading of the Supreme Court's opinion in *Burdine*.

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[7] *St. Mary's*, 509 U.S. at 506 (describing requirements of the *McDonnell Douglas* prima facie case as "minimal"); *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1094 (describing burden of establishing a prima facie case as "not onerous"). A quick search in the Westlaw database reveals more than one hundred published opinions in which federal appellate courts have characterized the burden of establishing a *McDonnell Douglas* prima facie case as "minimal," "de minimis," or "not onerous." Furthermore, at least three circuits have expressly stated that less evidence is needed to meet the requirements of the *McDonnell Douglas* prima facie case than to win a judgment on the ultimate issue of discrimination.

Recent Second Circuit cases characterizing the prima facie case as "minimal," "de minimis," or "not onerous" include *Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997); *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.2d 81, 87, 90 (2d Cir. 1996); *De la Cruz v. New York City Resources Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 20 (2d Cir. 1996); *Sutera v. Schering Corp.*, 73 F.3d 13, 16, 17 (2d Cir. 1995); *Quaratino*, 71 F.3d at 64, 65; *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203-04 (2d Cir. 1995); *Chambers*, 43 F.3d at 40; *Viola v. Phillips Med. Sys. of North America*, 42 F.3d 712, 716 (2d Cir. 1994); *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1225 (2d Cir. 1994); *Owens v. New York City Hous. Auth.*, 934 F.2d 405, 409 (2d Cir.), *cert. denied*, 502 U.S. 964, 112 S. Ct. 431 (1991); *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 934 (2d Cir. 1989).

(footnote continued)

He tells us that "*Burdine* defined a Title VII prima facie case [as specified in *McDonnell Douglas*] to mean adverse employment action taken 'under circumstances which give rise to an inference of unlawful discrimination.' " ___ F.3d at ___ (Newman op. at 4). He goes on to say, "Since those facts are sufficient to give rise to an inference of discrimination, they cannot cease to have such an effect simply because the employer has proffered an explanation." ___ F.3d at ___ (Newman op. at 5).

Judge Newman's interpretation of this clause in *Burdine* is rebutted by the next few sentences of that opinion. Two sentences later, Justice Powell explains that "the prima facie case raises an inference of discrimina-

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For examples of cases from other courts of appeals that describe the prima facie case in much the same way, *see EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997); *Kehoe v. Annheuser-Busch, Inc.*, 96 F.3d 1095, 1105 n.13 (8th Cir. 1996); *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497, 508 (3d Cir. 1996); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *Richardson v. Leeds Police Dep't*, 71 F.3d 801, 806 (11th Cir. 1995); *Byrd v. Ronayne*, 61 F.3d 1026, 1031 (1st Cir. 1995); *Warren v. City of Carlsbad*, 58 F.3d 439, 442 (9th Cir. 1995); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995); *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 797 (10th Cir. 1993); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1262 (7th Cir. 1993), *cert denied*, 511 U.S. 1005, 114 S. Ct. 1372 (1994).

Courts of appeals in at least three circuits have remarked that, by itself, the evidence required to establish a prima facie case under *McDonnell Douglas* is not invariably sufficient to sustain an ultimate finding of illegal discrimination. *See Avery Dennison Corp.*, 104 F.3d at 861 (6th Cir.) ("There must be a lower burden of proof to sustain a *prima facie* case than to win a judgment on the ultimate issue of discrimination. . . ."); *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995); ("The prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue of racially-motivated action."); *Wallis v. J.R. Simplot Co.*, 26 F.2d 885, 889 (9th Cir. 1994) ("The requisite degree of proof necessary to establish a *prima facie* case for Title VII and ADEA claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence.").

tion *only* because we *presume* these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors." *Burdine*, 450 U.S. at 254 (quoting *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis added, internal quotation marks omitted)). In other words, the inference wholly depends on the presumption, which disappears once the employer has proffered an explanation. The phrase "prima facie case"—as footnote 7 of *Burdine* says—is used in *McDonnell Douglas* not "to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue," but rather to "denote the establishment of a legally mandatory, rebuttable presumption."[8]

The dissenting opinions oddly interpret this footnote to mean that the minimal prima facie case identified by *McDonnell Douglas* is *more* probative of the ultimate fact in issue than a conventional prima facie case (which, on its own, has persuasive force sufficient to support the inference that the ultimate fact in issue is more probable than not). Footnote 7, when read in combination with the text, says just the opposite.

The *Burdine* opinion goes on to explain, in terms reiterated in *St. Mary's* and closely followed in this opinion, that "[e]stablishment of the prima facie case in effect creates a presumption that the employer discriminated

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[8] Footnote 7 in the *Burdine* opinion reads as follows:

The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Burdine, 450 U.S. at 254 n.7.

. . . . The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected . . . for a . . . nondiscriminatory reason. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted . . . . Plaintiff retains the burden of . . . persuading the court that she has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 254-56. Thus, *Burdine* makes clear that the presumption which bolsters the prima facie case is a transitory thing. Once the presumption has served its purpose of forcing out the employer's explanation, the prima facie case loses its capacity to support the (previously presumed) inference of illegal discrimination, other than by whatever intrinsic force the constituent evidence may have.

Finally, *Burdine* explains that the inference of illegal motive flows not simply from the set of facts specified in *McDonnell Douglas* but from those facts *coupled with the absence of an explanation*. *Id.* at 254 ("[T]he prima facie case raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of illegal factors."). As both *Burdine* and *St. Mary's* reiterate, once the employer does what the *McDonnell Douglas* rule was designed to force it to do—*i.e.*, give an explanation—the presumption disappears. Having lost the transitory benefit of the presumption, plaintiff must then satisfy the ultimate burden by showing facts from which one can reasonably find that forbidden discrimination was more probable than not. Judge Newman therefore misreads these cases when he argues that the initial, minimal *McDonnell Douglas* showing, on its

own, supports the ultimate, sufficient finding of discrimination.[9]

(ii) Judge Newman argues further that the Supreme Court cannot have meant in *McDonnell Douglas*, *Burdine* and *St. Mary's* what we understand it to have meant because that would be unconstitutional under *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910). In making this argument, the dissent seems once again to have misread the Supreme Court's precedent. *Turnipseed*, in fact, *upheld* the constitutionality of a statute which performed exactly the function the majority attributes to the *McDonnell Douglas* formula—forcing the defendant to explain. The Court stated,

> The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. . . . The statute, does not, therefore, . . . fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the *absence* of other evidence contradicting such inference.

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[9] Judges Newman and Winter thus contend that the bare facts presented in *Burdine*—that a qualified female applicant was rejected in favor of a man who had been her subordinate—are by themselves sufficient to support an ultimate finding of discrimination. *See* ___ F.3d at ___ (Newman op. at 16) In our view, they are not.

Turnipseed, 219 U.S. at 43 (emphasis added). Those words could serve equally well to describe the effect of the temporary inference raised by the *McDonnell Douglas* framework. We simply do not understand Judge Newman's argument.

All of this is admirably treated in Judge Calabresi's opinion, and we join in Part I of that opinion.

(iii) In Judge Newman's discussion of the force of a finding of pretext, he observes that our view "seems at odds" with a statement in the *St. Mary's* opinion that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of discrimination is required." *St. Mary's*, 509 U.S. at 511 (internal quotation marks, footnote and brackets omitted). The issues presented in *St. Mary's* did not require the Court to specify whether this statement ("no additional proof is required") refers to the substance of the evidence or to procedure, and the Court did not say.

We acknowledge that the sentence might be read to say that a prima facie case plus a finding of pretext is *always* sufficient to support a verdict in plaintiff's favor, so that such a finding precludes ordinary review for clear error. But that is not our understanding of what Justice Scalia meant.

First, if that were his meaning, he would necessarily be mistaken, as Judge Newman's dissenting opinion acknowledges. The majority and the dissent are on common ground that a finding of pretext, coupled with a prima facie case, "is not *always* sufficient to sustain an ultimate finding of discrimination." ___ F.3d at ___ (Newman op. at 36).

Second, that interpretation would be difficult to reconcile with Justice Scalia's pointed statement at the conclusion of the opinion that the verdict is subject to review under the "clearly erroneous" standard. Finally, such a view would be incompatible with Justice Scalia's clear assertion that once the employer produces an explanation, the *McDonnell Douglas* framework with its presumptions and burdens no longer operates. The *St. Mary's* opinion emphasizes that "[t]o resurrect [the presumption] later, after the trier of fact has determined that what was produced to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption '[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . The presumption having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture.' " *Id.* at 510-11 (quoting *Burdine*, 450 U.S. at 254). *See also id.* at 507 ("If the defendant carries this burden of production [of showing a nondiscriminatory reason for the challenged action], the presumption raised by the prima facie case is rebutted . . . and drops from the case.")

The main thrust of the *St. Mary's* majority opinion, as we read it, is that once the minimal prima facie case has served its purpose of forcing the employer to proffer a reason, all presumptions drop out and the case proceeds like any other—*i.e.*, with the burden on plaintiff to prove the case by evidence of discrimination sufficiently persuasive to allow a favorable verdict to survive clear error review. This central meaning of *St. Mary's* would be contradicted if we construe the "no additional proof . . . required" phrase to mean that a prima facie case plus a finding of pretext is necessarily sufficient to sustain a plaintiff's burden.

A more plausible reading of the statement that "no additional proof of discrimination is required" is that it concerns procedure. The opinion was discussing the minuet set in motion by *McDonnell Douglas*. For the first step, plaintiff must produce evidence to meet the minimal demands of a Title VII prima facie case. Plaintiff's doing so shifts the burden of production to the defendant to proffer a nondiscriminatory explanation. The statement that, once the defendant has made such a proffer, plaintiff is not required to produce "additional proof" of discrimination does not necessarily mean anything more than that, procedurally, the plaintiff need not proffer *additional* evidence but may rely on the evidence already received to rebut defendant's explanation and prove discrimination. Such a procedural observation does not diminish the plaintiff's obligation in the end to adduce sufficient evidence of discrimination to support a finding that discrimination was more probable than not.

Thus we do not think that our view of the significance of a finding of pretext is at odds with Justice Scalia's statement, properly understood.

(iv) We think Judge Winter's opinion exhibits two additional flaws of reasoning. First, Judge Winter is moved by what he sees as an anomaly—that an employer who lies can be better off than one who gives no explanation. ___ F.3d at ___ (Winter op. at 12). Any apparent illogic disappears when one recognizes that the *McDonnell Douglas* framework is a burden-shifting rule, designed to force the employer to give an explanation. This burden shift therefore gives the plaintiff merely a transitory advantage. The employer who gives an explanation is better off than the one who declines to do so. That is no anomaly.

Second, ambiguity in the meaning of the term "prima facie case" has caught Judge Winter in a semantic trap. That term is commonly used to describe two different functions in the course of a trial. Its original meaning refers to the quantum of evidence a plaintiff must adduce to escape dismissal *at the conclusion of the plaintiff's case*; it is also frequently used, however, to describe the quantum of evidence which must ultimately be found in the record to justify submission of the case to the jury (or to justify upholding a jury's verdict in plaintiff's favor). The reason the same term has come to be used to describe two functionally different tests is that *ordinarily* the quantum of evidence needed for both purposes is the same. In the usual case, to satisfy either test there must be sufficient evidence to support a finding in plaintiff's favor on every element of the claim by a preponderance.

Judge Winter thus assumes that if the four *McDonnell Douglas* factors are what is needed to prevent dismissal at the close of the plaintiff's evidence, that same evidence (unless the defendant has conclusively rebutted discrimination, proved a third motive, or disproved one of the four factors) must also assure that the plaintiff has sufficient evidence ultimately to justify a plaintiff's verdict.[10] But the Supreme Court has made clear that the test of sufficiency at the close of plaintiff's direct case is not the same as the ultimate test. In *McDonnell Douglas*, the Court referred expressly to the "*initial* burden . . . of establishing a prima facie case." 411 U.S. at 802 (emphasis added). It went on to explain in language

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[10] Judge Winter states, "I do not believe that a Court of Appeals should, or even can, hold that the four factor test illustrated in *McDonnell Douglas* is not by itself sufficient to support an inference of discrimination and causation in light of the statements to the contrary in *O'Connor*, *Burdine*, and *Teamsters*." ___ F.3d at ___ (Winter op. at 11).

quoted above from *Burdine* and *St. Mary's* that the minimal four *McDonnell Douglas* factors are held to support the inference of discrimination only because of a presumption created to smoke out the employer's proffer of explanation; and that once the employer explains, the presumption drops away, and the plaintiff then must prove discrimination by evidence reasonably capable of supporting that inference. If the Supreme Court had meant what Judge Winter suggests, employers would be subjected to liability for discrimination where none was present and none was shown. We respectfully believe Judge Winter has misunderstood the Supreme Court's precedents.

* * *

Judge Newman's opinion proclaims that the majority opinion undermines the law of discrimination. We do no such thing. We have faithfully applied the law as repeatedly explained by the Supreme Court. Under that law, notwithstanding the minimal requirements of the specially defined prima facie case, once the employer has proffered an explanation, a plaintiff may not prevail without evidence that, on its own, unaided by any artificially prescribed presumption, reasonably supports the inference of discrimination.

III

We now turn to Fisher's claim. Fisher presented a prima facie case of discrimination by reason of her marital status by showing (i) that she was a married woman, (ii) that she was qualified for tenure, (iii) that she was denied tenure and (iv) that tenure was granted to a woman who was not married (Pinina Norrod). Fisher established a prima facie case of age discrimination by

introducing the additional evidence that she was over the age of 40 at the time she was reviewed for tenure, and that eight of nine other tenured professors in the Biology Department were younger than Fisher when they were reviewed for tenure.

The burden of production then shifted to Vassar to proffer a legitimate, non-discriminatory reason for its employment decision. Vassar satisfied that burden by asserting that Fisher was denied tenure because she did not meet the posted standards for tenure, and that she was less qualified than other candidates who filled specific needs of the Biology Department. Vassar undertook to support these more general points by numerous more particularized assertions about Fisher's record. At that juncture, Fisher attempted to show that Vassar actually discriminated against her by introducing evidence that the reasons that Vassar proffered for denying her tenure were false, and by introducing other evidence intended to show that Vassar actually discriminated. This other evidence consisted of anecdotes, purported admissions made by Vassar, statistics, and expert testimony.

After an exhaustive analysis of Fisher's credentials and the credentials of other candidates for tenure in the Biology Department, the district court found that Vassar's asserted reasons were pretextual—*i.e.*, that the reasons stated by the employer were not the real reasons for the adverse employment action. After reviewing the evidence that Fisher introduced, the district court concluded that the real reason for denying Fisher tenure was intentional discrimination. The district court found that Vassar denied Fisher tenure because of her age and her status as a married woman, and found that Vassar had violated the Equal Pay Act by paying its male junior professors more than its female junior professors. The

court found against Fisher on her simple sex discrimination claim.

A panel of this Court sustained the district court's findings that Fisher had established a prima facie case of age and sex-plus discrimination. The panel also ruled that it could not find clear error in the district court's determination that certain of Vasser's assertions about Fisher's candidacy were inaccurate. But in reviewing the totality of the evidence, the panel found it insufficient to support a finding that Vassar actually discriminated against Fisher on the basis of her age or her status as a married woman. Because the panel was left with a definite and firm conviction that a mistake had been committed, it reversed the district court's decision. In light of the principles set forth in Part II above, the panel was within its power to do so.

The panel opinion employed the phrase that the finding of pretext in this case "points nowhere." The dissent makes much of this figure of speech, arguing in essence first that a finding of pretext must point somewhere and second that it points "in the same direction that all pretext findings point—toward [a] finding of discrimination." As to the first issue, the dissent is simply reading a rhetorical device with excessive literalness. What the panel opinion meant by "points nowhere" was that the inaccuracies in Vassar's statements are explicable by so many equally possible motivations that none emerged with any persuasive force; more particularly, the panel concluded that under the circumstances Vassar's inaccuracies gave little if any support to the inference that Vassar had engaged in discrimination.

We simply disagree with the dissent's suggestion that a finding of pretext in all but a few specified categories of cases reasonably supports a finding of discrimination,

as the true motivation. True, a finding of pretext will in many circumstances powerfully support a finding of discrimination. In others, as explained above, it will not. Even where the proffered reason is an outright falsehood, the power of that fact as support for a finding of discrimination is not, and should not be, a rule of law but a function of logic. A finding of pretext in circumstances that suggest numerous other possible unstated explanations no less likely than discrimination gives little inferential support to a finding of discrimination.

The argument of the dissent appears to be predicated on the assumption that the laws of evidence, in the manner of the U.S. Sentencing Guidelines, assign some fixed or special value to false statements in discrimination cases. That is a misguided view. The fact that an employer has given a false explanation is a piece of evidence. Like a false exculpatory statement, its strength as an indicator of guilt will vary with the circumstances. An employer may believe that a supervisor is hiring on merit, and proffer that explanation, but a jury may find pretext nevertheless without having a basis for belief as to whether the supervisor is hiring on the basis of friendship, bribery, a hatred for 42 year-olds, or animus against Romanians—so that, even if the pretext is attributed to the employer in these circumstances, there is no evidentiary support for a finding that the employer's pretext is a pretext for discrimination. To pick up one of the dissent's analogies, flight from the scene of a crime ordinarily has evidentiary weight, but flight from a scene of arson shows nothing if the defendant fled the scene of a department store inferno during business hours. Even if the defendant does not testify to being a shopper, the bare fact of such flight does not support an inference that the defendant is the arsonist.

The dissent goes on to express disapproval of people who lie or dissemble in their testimony. But factfinding (and review for clear error) are not moral judgments; they are exercises in logic as applied to the observation of human behavior. The issue is not whether we disapprove of the defendant's lack of candor; it is whether the plaintiff has proven discrimination. If a party's conduct fails to give logical support to the finding of a fact in issue, that fact may not be found merely because we disapprove of the conduct. A court should not enter judgments for unproved, nonexistent discrimination to express its disapproval of a party's giving of inaccurate explanations in court.

IV

To summarize, we consider how district courts should analyze discrimination cases in which the plaintiff has advanced a prima facie case, the defendant has proffered an explanation capable of being found false, and a jury has found for the plaintiff. When should such a verdict be left in place, when set aside?

The rule is that there is no rule peculiar to discrimination cases. As in all other areas, the answer depends on how forcefully the evidence has shown what plaintiff has the burden of showing—that the adverse employment action suffered by plaintiff was attributable to the alleged discrimination. If the evidence (and the inferences reasonably flowing from it) can demonstrate that the plaintiff was likely injured by the defendant's illegal discrimination, then the evidence gives rise to a jury issue, and a verdict in plaintiff's favor must be left undisturbed. If they cannot, and the jury is left to mere speculation, then the lack of evidentiary support compels

the court to conclude that a mistake has been made. The court in those circumstances must find the plaintiff's verdict to be clearly erroneous and set it aside.

The point is that once the plaintiff has satisfied the minimal requirements for a prima facie case under *McDonnell Douglas*, and the defendant has responded by proffering a nondiscriminatory explanation, all special rules drop from the case. *See St. Mary's*, 509 U.S. at 507, 510-11. At this point no rule of law gives artificially enhanced weight to any piece of evidence.

Plaintiff's initial showing of discrimination may be strong or weak, depending on the particular evidence. The mere fact that a plaintiff has met the reduced demands of Title VII for a prima facie case gives little assurance that plaintiff has significant proof of discrimination.

As to the employer's proffer of a nondiscriminatory reason which the factfinder finds to be false, its probative force is also highly variable. As stated above, employers characteristically give false explanations for employment decisions for many different reasons. That an employer has done so means that there is something to hide. Discrimination is without doubt one of the things employers may seek to hide by giving a false explanation. It is by no means the only one. The fact that the employer is hiding something does not necessarily mean that the hidden something is discrimination. Generally speaking, the stronger the evidence that illegal discrimination is present, the greater the likelihood that discrimination is what the employer's false statement seeks to conceal. And, conversely, the weaker the evidence of discrimination, the less reason there is to believe that the employer's false statement concealed discrimination, as opposed to the numerous other rea-

sons for which employers so frequently give false reasons for employment decisions.

When a court comes to consider, either upon defendant's motion for summary judgment, or after a plaintiff's verdict, whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness or falsity of the employer's explanation, or any other piece of evidence. As in any other type of case, the judge must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination. If so, summary judgment must be denied and/or a jury verdict for plaintiff must be sustained. If not, the defendant is entitled to summary judgment or to the overturning of a plaintiff's verdict as clearly erroneous.

V

We are sitting in banc to reconsider the question of law discussed in Part II, and not to involve all the judges of our Court in a review of the district court's factual findings. Therefore, we hereby modify our order for hearing this appeal in banc, *see Fisher v. Vassar College*, No. 94-7737 (2d Cir. Feb. 16, 1996) (order for rehearing) to provide that the in banc rehearing is limited to the force and effect of a pretext finding, taken together with a prima facie case, in considering on appeal whether or not an ultimate finding of discrimination is clearly erroneous under Fed. R. Civ. P. 52(a). Because our ruling on that question reaffirms the applicability of the rule employed by the panel—that no special weight is given to the evidence that supports the prima facie

case and pretext in conducting clear error review of an ultimate finder of discrimination—we have no reason to suppose that the panel would now alter its views on the application of that rule to the district court's findings. Accordingly, there is no need to remand to the panel for renewed consideration in light of the in banc court's opinion.[11] The mandate of the Court shall issue reversing the judgment of the district court, drawing its authority from the opinion of the in banc court as to the appropriateness of appellate review for clear error, and the panel's rulings as to the disposition of all other issues in the appeal.

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[11] Judge Newman's dissenting opinion argues that the majority has somehow behaved improperly by limiting our in banc review to the issue of law, and declining to review the panel's assessment of the facts. "[T]he in banc court," it argues, "normally ought to make its independent assessment of the appeal" (including all issues involved in the appeal) __ F.3d __ (Newman op. at 44). No authorities are cited in support of this surprising argument, and we can imagine none. When a majority of the in banc court determines that in banc review is warranted for only certain specified issues, what reason can there be to consume the time of all the court's judges on other issues that do not warrant in banc review?

Judge Newman goes on to argue that in these narrow circumstances control of the scope of in banc review should pass from the majority of the Court to the minority. We can see no justification for this view.

Judge Newman's references to Supreme Court practice are completely inapposite because in the Supreme Court the principle of majority rule is potentially in conflict with the "unwritten Rule of Four" that permits a minority of four to place a case on the Court's docket. *See* 16B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4004.2 (1996). If the other five members of the Court can then dismiss it, the rule allowing four to secure a hearing is nullified.

The Supreme Court's precedents and its discussions of this issue have no application to our practice because in our court a majority is needed to secure in banc review. The majority is equally free to dismiss the in banc proceeding, or to regulate its scope.

Conclusion

The judgment of the district court is reversed. Judgment shall be in favor of the defendant.

JACOBS, *Circuit Judge*, concurring:

The in banc majority, naturally, has limited its review to the legal issues presented, and therefore the majority opinion does not address Chief Judge Newman's fact-specific argument that the panel arrived at the wrong result in this case. As the author of the panel opinion, I write separately to meet the dissent on this ground.[1] The best refutation of the dissent is the panel opinion; there is no complaint that it is too short, and there is no point in reprinting it. I therefore respectfully refer the reader to it, and limit myself in this separate concurrence to rebutting selected arguments and aspersions in the dissent.

I

The dissent's critique of the panel's work is rooted in the dissent's errors of law. Absent "rare" and "special circumstances existing in the record," *see* ___ F.3d at ___ (Newman op. at 30), the dissent would insulate from reversal any ultimate finding of discrimination premised on a prima facie case coupled with a sustainable finding of pretext. Appellate scrutiny would be limited by the dissent to instances in which the record facts "overwhelmingly establish a third motive for the pretextual

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[1] Unless otherwise indicated, all references to "the dissent" are to Chief Judge Newman's dissenting opinion.

proffer, undermine a component of the plaintiff's prima facie case, or demonstrate that the defendant is highly unlikely to have discriminated." ___ F.3d at ___ (Newman op. at 42).[2] It is unclear in this passage if "overwhelmingly" modifies all three phrases or just the first, but in effect that hardly matters.

The dissent's application of its new standard of appellate review to the age discrimination claim in this case neatly demonstrates that the dissent's new rules would do away with meaningful appellate review of discrimination awards. The dissent would affirm the district court's award of more than one half million dollars under the ADEA. That award was made—after being doubled on a finding of willfulness—on the rock bottom minimum showing that the dissent argues is sufficient to withstand (or evade) appellate scrutiny for clear error.[3]

In determining that age discrimination had been proven, the district court found that:

> (1) Fisher made out a prima facie case by the de minimis showing that she was over 40 years of age, that she was otherwise qualified for the job, and that eight of nine other tenured professors in the Biology

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[2] Thus, the dissent says that "clear error could occur if the record *overwhelmingly* established" certain circumstances of a kind referenced earlier in the dissent, ___ F.3d at ___ (Newman op. at 42, 31-32), specifically, circumstances in which a pretext may mask the following motives: (i) a reluctance to accuse the employee of wrongdoing (a reluctance that would not exist at trial), (ii) the desire to protect business secrets (an objective ordinarily assured by protective orders), and (iii) the fear of disclosing the employer's own embezzlement (an example utterly removed from common experience).

[3] Judge Motley (on the last day of trial) *sua sponte* suggested that plaintiff's attorney amend the complaint to add the ADEA claim despite the concession on the first day of trial that age was "not in the case." T. at 2390.

Department were at least nine years younger than Fisher when they were reviewed for tenure.

(2) Vassar's articulated reason for denying tenure to Fisher was pretextual.

852 F. Supp. at 1230-31. There is nothing else. The district court noted that two other items of evidence were offered up to support the age discrimination claim, but the court rejected them, as the dissent observes. A review of the district court opinion confirms that there is no other evidence of age discrimination, period. The panel opinion concluded that Fisher had shown no more than that she was the oldest candidate in the biology department to have been considered for tenure, which was unremarkable because few candidates for tenure have had an eight year interruption in their careers. Moreover, Fisher's evidence consisted solely of a list of eight faculty members who were younger than Fisher when considered for tenure. The sample, too small to bear statistical weight in the first place, was selected on no evident principle. The panel therefore held that Judge Motley had committed clear error in finding that the evidence presented by Fisher amounted to sufficient proof to support an ADEA claim.

The dissent would find that the panel erred; but the dissent will not contest that the evidence of age discrimination is scant. This scant showing embarrasses the dissent's theory that a bare pretext added to a prima facie case has some special weight that evades appellate review for clear error absent a handful of barely imaginable contingencies. It is easy to see in this case that such special weight would simply be a thumb on the scale. Evidently to avoid this self-refuting application of its rule, the dissent adds to the quantum of proof a new finding to shore up its ultimate finding of age discrimi-

nation—a finding on which the district court's ADEA ruling did not rely. Thus, the dissenters dwell on Dr. Fisher's hiatus from teaching: "had Dr. Fisher not taken eight years off from teaching to raise her children, before joining the Vassar faculty, she would have been within the age group from which Vassar is apparently willing to select tenured professors." ___ F.3d at ___ (Newman op. at 61).[4]

This is a circularity. Dr. Fisher was eight years older when she arrived at Vassar because she took an eight year hiatus. But she would have been eight years older than she otherwise was if she had devoted eight years to being a social worker (which is what Dr. Fisher did after being denied tenure), or running for office, or training for the Olympics, or serving in the military, or running a farm or business, or writing a book, or performing charitable work. Aging goes on pretty much whatever we are doing. The fact of the hiatus adds nothing to the prima facie case (which of course already factors in her age) except as a fancy way of saying that she was eight years older than she would have been if she had been eight years younger than she was. No wonder the district court did not consider this to be evidence of age discrimination. The dissent wouldn't either if there were anything else.

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[4] It is an unintentional irony that the dissent, which criticizes the panel as a "super fact-finder," proceeds to rely upon evidence that the district court (as fact-finder) did not find probative of age discrimination.

II

The language of the dissent betrays a felt need to avoid saying just where the pretext finding does point. The word "discrimination" is used by the dissent *passim* without specification as to the *basis* of any discrimination. The dissent writes:

> [T]he panel opinion is quite wrong to assert that the pretext finding made by the District Court in this case "points nowhere." On the contrary, *it starts out pointing in the same direction that all pretext findings point—toward the finding of discrimination that is inferable from the facts constituting the plaintiff's prima facie case.*

___ F.3d at ___ (Newman. op. at 29-30) (emphasis added). But this still begs the question presented to the district court and the panel: discrimination on what ground? The footnote dangling from this passage concedes that the situation is "complicated by the circumstance that the plaintiff has alleged discrimination on two different grounds." *Id.* at ___ n.8 (Newman op. at 30 n.8). A further complication for the dissent is that Dr. Fisher presented a prima facie case on *both* grounds: age and sex-plus-marriage. But the dissent never deals with the vector of a pretext finding when—as often happens—a plaintiff alleges discrimination on three grounds, or four; where a plaintiff is actually the victim of discrimination on multiple grounds; where a plaintiff alleges two grounds of discrimination when there is no evidence that bears specifically on one more than the other; or where a plaintiff may have suffered discrimination on several grounds, some of which are not illegal. In such circumstances, the dissent offers little useful guidance for district courts in bench trials, and would

require fugue-like jury charges to explain these notions to a jury.

In Dr. Fisher's case, where indeed *does* the pretext point? The district court found *two* grounds of discrimination—three of them, if one considers the bantamweight finding of sex discrimination under the Equal Pay Act. This is an embarrassment of riches to the dissent, because (unless at least one ground of discrimination is held clear error) the pretext finding must point in multiple directions.

Different courts and judges have different ideas about where (if anywhere) the pretext points in this case. (A) The district court held that the evidence points to willful discrimination on the basis of Dr. Fisher's *age* as well as on the basis of her status as a *married woman*.[5] (B) The dissenters agree with the district court that the pretext points decisively to discrimination against the aged and against married women. The dissenters feel, however, that the pretext points "more strongly" to sex-plus discrimination; but they conclude that it was "within the prerogative" of Judge Motley to infer discrimination from the pretext on both grounds because "marital status is not realistically incompatible with additional discrimination based on age." ___ F.3d at ___ (Newman op. at 62). Thus, for the dissent, pretext (out of doctrinal necessity) points in as many directions as can be deemed consistent.[6] (C) Judge Calabresi's

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[5] The district court held that the age discrimination was willful, *Fisher*, 852 F. Supp. at 1230-31, and entered a judgment that could not be supported solely by a Title VII violation. *Id.* at 1234. So everything on sex-plus discrimination is an alternative holding and does not add one thin dime to the judgment.

[6] Had Dr. Fisher presented a prima facie showing of discrimination on the basis of religion, national origin, or sexual orientation, the finding

opinion asks whether Vassar's assertion that Fisher spent insufficient time in the laboratory *could* be premised on a stereotypical view that *married women with children* "spend less time in the lab." ___ F.3d at ___ (Calabresi op. at 15). It could—if there were any evidence that Vassar's decision-makers were in the grip of such a stereotype. But *marriage* would seem to be beside the point; the pretext finding that Judge Calabresi posits could point as well to discrimination based on a general stereotype of *women as care-givers*, and directed against all *working women*, or (perhaps) against all *working mothers*. (D) Finally, the panel concluded that the district court's pretext finding pointed nowhere.

The most that one can say about the direction of the pretext finding in this case is that, like a compass at the Pole, it wheels all over the place.

III

Having shown that the dissent's deferential review of the district court's age discrimination finding is all deference, no review, I turn to what the dissent believes is evidence that points to and supports an ultimate finding of discrimination on the basis of Dr. Fisher's status as a married woman.

It is obvious that any employment decision reflects a preference for the candidate who gets the spot. Here, Dr. Pinina Norrod won tenure in the Biology Department the same year that Dr. Fisher lost. The district court found that:

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of pretext (according to the dissent) would presumably point in these directions also.

> . . . the senior members of the Biology Department were determined that Dr. Fisher be denied tenure and that Dr. Norrod be promoted and granted tenure.

852 F. Supp. at 1217 (finding # 92). The dissent adopts the operating assumption that there are only two potential motives for that preference: (a) merit ("a college [is] usually regarded as a bastion of uninhibited pursuit of truth," ___ F.3d at ___ (Newman op. at 23)), or (b) illegal discrimination. That is an invalid assumption for the creation of inferences. Accepting the district court's finding that the tenure selection process was skewed to prefer Dr. Norrod, the question becomes: what evidence offers an explanation for that preference? Dr. Norrod had been married at the time she was hired by Vassar. T. at 2283. Although she had been divorced at the time the tenure decision was made, she was then in a long-term relationship that led to marriage soon after. T. at 2283-84; 70 F.3d at 1475. Was Vassar skewing its tenure decisions in the Biology Department, as the district court held, to get rid of Dr. Fisher because she was married in order to grant tenure to another woman because she was between marriages? In any event, does this finding command affirmance, as the dissent would hold, without further scrutiny for clear error?

The dissent, ___ F.3d at ___ (Newman op. at 58), draws confidence on this point from the district court's finding that "the Biology Department's senior faculty" had accepted a "stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist and, therefore, is not one despite much evidence to the contrary." 852 F. Supp. at 1216 (finding # 87). In reading this finding, one should keep in mind that the chairman of Vassar's Biology Department for nine years had been Dr. Patricia Johnson, a

mother who raised her daughters in that time. T. at 2283. The district court dealt with that inconvenient fact by drawing the contours of the supposed prejudice so as to exclude Dr. Johnson: the operative words in finding # 87 are "married" and "on-going," which excise (the divorced) Dr. Johnson from the picture—a bit of "stereotype and bias" to the effect that a divorced mother does not have "an active and on-going family life." For the same reason, the wording of finding # 87 excludes Dr. Norrod, the woman who (between marriages) won tenure in 1985 over Dr. Fisher as well as over Dr. Edward Tucker.

The district court also limited its survey to married women in the "hard" sciences (finding # 80), and narrowed the field further still by excluding the married women who were granted tenure in the Psychology Department, on the ground that psychology is deemed to be a "soft" science (notwithstanding undisputed testimony that Vassar's Psychology Department is considered part of the hard sciences due largely to its focus on experimental laboratory studies) (T. at 2216-18).

Finding #87 reflects Dr. Fisher's strategy at trial. She defined the ground of discrimination by reference to a set of characteristics that describe her, but that are so particular as to create in a small field a category of one.[7] Following Dr. Fisher's lead, the district court arrived at the conclusion that there is a sex-based animus at work at Vassar that denied tenure to Dr. Fisher so that preferment could be given to women who have divorced, women who have not yet married, and married female scientists who work in psychology rather than biology. The dissent would hold that this inference enjoys a spe-

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[7] "How fascinating is that class/ Whose only member is Me!" W. H. Auden, "Islands," 24, *The Shield of Achilles* (1955).

cial procedural insulation from ordinary clear error review.

The dissent also fixates upon a couple of specific findings made by the district court, to which I turn now.

A. *Teaching Evaluations.*

As to the panel's review of the statistical evidence and anecdotal evidence in the case, the dissent "for purposes of this discussion, . . . assume[s]" that the panel was right. ___ F.3d at ___ (Newman op. at 55). But the dissent points to a group of findings that supposedly demonstrate "discriminatory use of student evaluations." *Id.* I will review those findings as briefly as possible. After the district court found (finding # 47) that Vassar students evaluate teachers on a scale of one to five, and (finding # 48) that Dr. Fisher exceeded what the Dean of Faculty called a "good statistic" of 70 fours and fives combined, the court went on to find that the tenure review committee:

> reached its unfavorable conclusions as to Dr. Fisher's teaching record by applying different standards to her than were applied to other tenure candidates. The Committee distorted the numbers by counting *only fives for Dr. Fisher* while counting *fours and fives for the other candidates* to *determine* student evaluation rankings. (R. at 289-99, 1146.)

(finding # 49 (emphasis added)). Taken at face value, this finding supports the conclusion that Vassar did not give Dr. Fisher a fair shake.[8] The dissent points to these findings as weighty evidence of sex-plus discrimination,

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[8] The panel opinion did not dwell on these findings because other findings adequately assured that the pretext finding would survive clear error review.

but they do not at all suggest that Dr. Fisher was disfavored because she had not divorced her husband; and they are entirely consistent with the Department's preference for Dr. Norrod, a preference that could have numerous grounds, differing from one faculty member to the next.

But the dissent errs in accepting finding # 49 at face value, and in reading it (as the language lends itself to being read) to mean (1) that the tenure review committee used a numerical bench-mark—a combined score of fours and fives—to measure the relative teaching ability of tenure candidates; (2) that "other candidates" were measured by this benchmark; and (3) that Dr. Fisher was downgraded because her score—distorted by counting fives only—was lower than the teaching score of other candidates.[9] These impressions do not survive a look at the underlying evidence.

The district court gives two record references to support finding # 49: "R. at 298-99, 1146." 852 F. Supp. at 1209. The first record cite is to Dr. Fisher's own testimony, testimony that says nothing about how the *college* used or did not use the student evaluation numbers; in that passage, Dr. Fisher testified about charts prepared for trial by her own counsel tabulating the numerical results of the student evaluation sheets for Dr. Fisher and the other specified candidates. These charts arguably support the idea that Dr. Fisher was a good teacher (hence the adequately supported finding of pretext), but they do not show how if at all the college *used* this data.

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[9] That sinister impression is reinforced by finding # 50, which contains a table of Dr. Fisher's fours and fives in various categories of teaching skill; but that table is drawn from a compilation prepared for trial by Fisher's counsel rather than from any Vassar document purporting to assign number scores as a summary of teaching ability. T. 1298-1300.

The second record cite ("1146") is to the testimony of the plaintiff's expert, Dr. John Castellot, a professor of biology at Tufts University. Dr. Castellot never taught at Vassar and was not involved in the tenure review process; he conceded that he had never served on a tenure review committee *anywhere*. R. 1155. Indeed, his testimony was offered primarily to show that Dr. Fisher's research in the field of biology compared favorably with the research of her colleagues. Over Vassar's objection, Dr. Castellot testified as to the tenure review process at Vassar as follows:

> In looking over the data collected on teaching, what struck me was that the tenure committee appears to only consider the percentage of fives in the top of the scale when looking at Dr. Fisher's teaching evaluations, whereas they consistently lumped fours and fives together, which is what we do at our institution—at least what I do in my courses.
>
> * * *
>
> It struck me that for Dr. Fisher there was frequent mention of only the fives, without including the fours together. The same standard was not applied to the other individuals that were being considered for tenure. In this case, fours and fives were lumped together.

R. 1164. In this passage, Dr. Castellot apparently was referring to two sets of documents. First, he referred to three "outside evaluations" of Dr. Fisher performed for the Biology Department by biologists at other institutions (Exhs. 12A, 12B and 12C). These evaluations do not refer to the one-to-five numerical ratings, and on the whole are favorable to Dr. Fisher.

Second, Dr. Castellot referred to the tenure assessment letters prepared by the Biology Department for Drs. Suter, Mehaffey, Hemmes, Norrod, and Fisher (Exhs. 323, 304, 292, 338, and 216). These documents do not indicate or suggest that the teaching ability of tenure candidates was measured by any single formula or benchmark. They show that, in assessing teaching ability, the tenure committee considered far more than just student evaluations, and gauged teaching ability based on various factors such as course difficulty and the introduction of new courses to the curriculum. Most important, the tenure assessment letters employ no uniform statistical method in evaluating the teaching skills of tenure candidates, and did not use any disparate method in evaluating Dr. Fisher. Sometimes—for Dr. Fisher and others—the letters consider the combined number of fours and fives; sometimes the letters consider fives only—particularly if the number of fives reflect some remarkable feature, such as all fives for a course, or none, or (as in Dr. Fisher's case) a fall-off over time from many fives to none. The particulars from the record are set forth in the margin.[10]

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[10] Dr. Suter's tenure letter indicates that students gave him mixed reviews, from two to five, and that one course in particular received persistently low student evaluations. Dr. Mehaffey's tenure letter describes his student evaluations as "excellent" because 83% of his students had ranked him in the top two categories for instructor effectiveness. Dr. Hemmes's tenure letter notes that 78-100% of his students ranked him in the top two categories for three consecutive years. Dr. Norrod's tenure letter notes that all of her students in one course gave fives; that "the majority" of her students gave her a grade of four or five; and that she incurred an "occasional" rank of three or below.

Dr. Fisher's tenure letter, which overall offers a less than favorable assessment of her teaching ability, does not employ any different standards. The letter notes that Dr. Fisher scored "well for openness (62% in the four and five ranks), but not so well in clarity (8% in the five rank), mastery (31% in the five rank) and ability to illuminate difficult material (15% in the five rank)." The committee considered her evaluations

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The district court relied on finding # 49 (and the related findings) chiefly to show pretext and Dr. Fisher's qualifications for tenure. The dissent relies on these findings to show that the reason for disfavoring Dr. Fisher's candidacy was sex-plus-marriage discrimination. These findings do not begin to support that inference. Dr. Castellot's "opinion"—phrased in terms of "what struck me"—is unsupported by evidence of any detectable difference in treatment between Dr. Fisher and her colleagues in terms of the use of the student evaluations. And, as the dissent (barely) concedes, that weight is arguably "lessened" by finding # 55, which says and explains why "[a]ny comparison to Dr. Norrod's teaching evaluations, which were excellent, does not give a true picture of the situation." 852 F. Supp. at 1210. Thus, according to the district court, the teaching evaluations of Dr. Norrod—the only successful candidate who competed head to head with Dr. Fisher for tenure in 1985—cannot be usefully compared with Dr. Fisher's evaluations. I cannot think why the dissent—in light of that—would place determinative weight on the teaching evaluations in order to explain why Dr. Norrod was chosen and Dr. Fisher was not.

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for 1978 to 1980 "as good" because over 50% of her students ranked her in the top category. The committee characterized her scores for 1982-83 as "totally unsatisfactory" because none of her students had given her a top grade for two skills (clarity and ability to think), and only 29% and 17% of her students had given her a grade of four in those categories. The committee expressed concern that Dr. Fisher's evaluations had declined over a period of five years, noting that the percentage of students who ranked her in the top category for clarity declined from 39% to zero, and that the percentage who ranked her in the top category for ability to illuminate declined from 52% to zero. With respect to an advanced class, the committee noted that in 1982-83 none of Dr. Fisher's students gave her a top rank and only 20% gave her a rank of four for ability to illuminate. (People who find this information insignificant have forgotten their college days.)

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B. *Hiatus.*

The dissent identifies a second set of findings as lending great support to an ultimate finding of sex-plus discrimination: the emphasis on Dr. Fisher's hiatus from her profession. Dr. Fisher completed her post-graduate studies in 1966. From then until 1974, she devoted herself to her family full-time. From 1974 to 1977, she taught part-time at Marist College. Her first full-time employment in biology was at Vassar in 1977. In the tenure evaluation process, some faculty members mentioned—and some emphasized—that Dr. Fisher had been out of the field for ten years. The dissent characterizes these findings as part (actually, close to all) of the "strong" case of sex-plus discrimination, and chides the panel for discounting them.

The dissent argues that consideration of such a hiatus, absent an adverse impact on a person's current attainments, unfairly burdens "working women." ___ F.3d at ___ (Newman op. at 59). I agree. However, "working women" is a category that takes in all women in the workplace and therefore bears upon simple *sex* discrimination, rather than sex-plus-marriage. *See Coleman v. B-G Maintenance Management of Colorado, Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) (to prove sex-plus-marriage discrimination plaintiff must show that subclass of *married* women were treated differently than subclass of married men). As it happens, however, the district court *rejected* Dr. Fisher's claim of sex discrimination as baseless. 852 F. Supp. at 1225.

The dissent is much more avid than the district court about the weight of the hiatus issue. The dissent deems the hiatus comments "further evidence" of discrimination on the basis of sex-plus-marriage. ___ F.3d at ___ (Newman op. at 60). But the district court, after

noting the Biology Department's position (expressed at a faculty committee meeting) that Dr. Fisher was "[o]ut of date—out of the field for 10 years," found: "these statements do not establish, by themselves, direct evidence of an illegitimate factor." 852 F. Supp. at 1231 n.25. (As discussed above, the dissent deems the hiatus to be probative of age discrimination as well, though the district court did not.)

In any event, evidence of such a hiatus could have bearing only on a sex-based *disparate impact* claim. However, as the panel opinion and the district court opinion emphasize, no disparate impact claim was pleaded or mounted here. *See* 70 F.3d at 1443; 852 F. Supp. at 1226 n.15. Thus, although this issue might have potential for pleading and development under a theory of disparate impact, there is no basis for considering that claim in this case.

CALABRESI, *Circuit Judge*, concurring in part and dissenting in part

There are, it seems to me, four principal issues that divide this court. The first is the weight to be given to the plaintiff's prima facie case of discrimination once the defendant has proffered an explanation for its actions. The second is the significance to be afforded to the fact that the explanation is found to be pretextual. The third is whether, given the in banc court's answer to the first two questions and the history of this case, it is (a) appropriate, (b) permissible but unwise, or (c) simply illegitimate for the in banc court to leave standing the original appellate panel's conclusions. The fourth and final point is whether—applying the in banc court's

answer to the first two questions to the facts of this case—a reversal of the trial court's finding of discrimination is warranted. (Only the dissenters, Judge Jacobs, and—by implication—the original panel members, have spoken to this last issue).

On the first two questions, I agree with the majority of the in banc court. As to the third, I agree with the dissenters' conclusions (though only as a matter of prudence rather than of propriety). Finally, I am not yet prepared to reach a final decision on the fourth issue, and think it unwise to do so now.

I.[1]

What is the significance, once the defendant has proffered an explanation, of the fact that the plaintiff has, admittedly, made out a *Burdine-St. Mary's* prima facie case of discrimination? *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-54 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). On this point, I join Parts II(a), II(c), and II(d) of the majority opinion. I add a few words because I believe that the dissenting opinions are unduly reductionist in their view of presumptions and prima facie cases, and that Chief Judge Newman's opinion in particular misconstrues those ancient Supreme Court railroad accident cases, *Mobile, Jackson, & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910) and *Western & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929). Properly understood, I believe these cases support the majority on this issue.

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[1] Judges Miner, Walker, McLaughlin, Jacobs, Leval, and Parker join this Part of my opinion.

In *Turnipseed*, the Court found constitutional a state statute that permitted an inference of negligence to be drawn against the railroad defendant from the fact of a railroad accident. While requiring a rational connection between the fact shown (the accident) and the fact inferred (negligence), the Court found that such a link existed. It neither required nor found that reasonable people would believe more probably than not that the existence of a railroad accident bespoke railroad negligence. It simply found that the correlation between railroad accidents and railroad negligence was high enough to justify—constitutionally—the placement of the burden of explaining what happened on the railroad. Indeed, the connection was strong enough, the Court held, to allow a state to *require* a verdict against the railroad if it failed to answer. *See Turnipseed*, 219 U.S. at 43-44.

Henderson did not overrule *Turnipseed*. It held, however, that the link between a railroad accident and railroad negligence, while strong enough to allow the placing of the burden of response on the railroad under *Turnipseed*, was *not* strong enough to survive and affect the jury's determination *once the railroad had proffered an answer*. This was because reasonable jurors could not find that the fact to be proven (the railroad's negligence) followed, more probably than not, from the fact demonstrated (the accident). In other words, the correlation between the two was high enough to impose on the defendant the duty to answer, but it was not strong enough to support a jury verdict after the defendant had proffered that answer. *See Henderson*, 279 U.S. at 642-44.

Turnipseed and *Henderson* do not fit within the dissenters' tidy schema. The inference in *Turnipseed* is, in Judge Winter's terms, a strong prima facie case. That is,

it *compels* (rather than simply *permits*) a judgment for the plaintiff if it is not answered. *Turnipseed*, 219 U.S. at 43. And yet, it is sufficiently weak—it does not reflect strong enough correlations between the fact shown and the fact to be inferred—to survive and be considered by the jury once the defendant has answered. *See Henderson*, 279 U.S. at 642-44.[2]

Applying *Turnipseed* and *Henderson* to the situation before us, what do we see? We see that certain facts that correlate with discrimination have been deemed sufficient to require an answer from the defendant. That is

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[2] Nothing in the later criminal law cases cited in Chief Judge Newman's dissent undercuts the basic holdings in *Turnipseed* and *Henderson*.

Judge Winter suggests that *Turnipseed* and *Henderson* are no longer good law despite the fact that the Supreme Court has never overruled them. *See* ___ F.3d at ___. (Winter op. at 7 n.2) Leaving aside whether academic criticism can, in Common Law legal systems (as opposed to Civil Law legal systems), deprive court decisions of their authority, I believe the criticism of these cases to be more limited than Judge Winter implies. *Turnipseed* and *Henderson* had two strings to their bows. The first was that facts proved—railroad accidents—that are only mildly correlated to facts to be shown—railroad fault—can constitutionally support a temporary inference of negligence requiring an answer, and yet not be constitutionally sufficient to permit a jury to find negligence "more probably than not." The second was that, to be constitutional, presumptions that shift the burden of proof (*i.e.* the risk of non-persuasion) must be based on facts that are highly correlated to the facts to be proven. The second has, indeed, been effectively criticized. The first, which is what is germane to the issues before us, has not been similarly undermined.

It is easy to see why. The question of who should bear the risk of non-persuasion is a policy issue that may be made for any number of reasons. As such it is like the decision to hold a railroad liable for rail accidents regardless of fault. Neither depends logically on whether the plaintiff has or has not shown facts demonstrating negligence. The question, instead, of whether the showing of an accident is sufficiently correlated to negligence to support that finding "more probably than not" is a logical-empirical one. It is this latter question that *Henderson* and its progeny say must be answered correctly to satisfy Due Process.

the meaning of Title VII as read by *Burdine* and *St. Mary's*. We also see that over time the facts the plaintiff must show to require such an answer have become relatively minor. Case after case emphasizes their *de minimis* nature. *See, e.g.*, *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 90 (2d Cir. 1996); *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).[3] In other words, though still sufficiently correlated with discrimination to satisfy a requirement that the defendant answer on pain of losing, these facts, like the facts of an accident in *Turnipseed* that also required an answer, do not necessarily, and without more, support a finding of discrimination. Indeed, if Title VII required that facts so weakly correlated to discrimination as those we have deemed sufficient to make out a prima facie case, be enough—in the presence of an answer by the defendant—to support a finding of discrimination, Title VII would give rise to significant constitutional doubts under *Henderson* and its progeny.

It will not do to say, as Chief Judge Newman's dissent seems to, that since *Henderson* requires a strong relationship between the fact shown and that inferred, plaintiff's case necessarily meets that requirement. To the contrary, *Henderson* quite clearly distinguished between what is necessary to require an answer and what is necessary to permit a factfinder, without more, to find discrimination. On the one hand, the *Henderson* Court did not disturb *Turnipseed's* holding that a statute was valid

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[3] All that is needed is that the plaintiff "was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. *Burdine*, relying on *McDonnell Douglas*, recognized that this showing is made if the plaintiff belonged to a protected class, was qualified for a job, and was rejected for it despite the fact that this position remained open to applicants with similar qualifications. *See id.* at 253 n.6 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

to the extent that it stated that an accident and railroad negligence were sufficiently linked to require an answer by the railroad. On the other hand, the *Henderson* Court struck down the Georgia statute insofar as that statute, on the basis of the same correlation, permitted a factfinder to find that there was railroad negligence whenever there was an accident.

Under the circumstances, there are only two ways out. We may follow the majority and say that all that the plaintiff's prima facie case does is what the valid statute did in *Turnipseed*—require the defendant to speak. And once the defendant has spoken, the existence of sufficient evidence of discrimination must be determined anew by looking at all the evidence independently from the existence of the previous temporary inference/presumption. Alternatively, we may reject the majority's view and declare that a plaintiff may not make out a prima facie case under Title VII without presenting evidence that is, in the first instance, sufficiently correlated with discrimination so that reasonable people can find more probably than not that there is discrimination whenever the plaintiff has made such a showing. This interpretation would, in my judgment, force us to demand, for a prima facie case, evidence of discrimination that goes well beyond the *de minimis* amount that the *McDonnell Douglas* factors, as accepted by *Burdine* and applied consistently by the circuit courts, have deemed sufficient.

The dissenters disagree. They believe that *Burdine*, in effect, limits the role played by the *McDonnell Douglas* factors by providing that those factors are enough to establish a prima facie case only in "circumstances which give rise to an inference of unlawful discrimination," and that in such circumstances they *are* suffi-

ciently correlated with discrimination to meet the requirements of *Henderson*. I think that the dissenters are wrong.

In the first place, *Burdine* defines "circumstances which give rise to an inference of unlawful discrimination" by giving the four *McDonnell Douglas* factors as an example. It makes clear that those factors are sufficient (but not necessary) to establish what it calls a prima facie case. *See Burdine*, 450 U.S. at 253-54 & n.6. Accordingly, *Burdine* cannot fairly be interpreted to add any requirements for a prima facie case beyond what was demanded in *McDonnell Douglas*, and what it means by "inference" must be a *Turnipseed* inference. Indeed, after *Burdine*, courts have continued regularly to rely on the four *McDonnell Douglas* factors to determine when a *de minimis* prima facie case exists.

In the second place, while the dissenters criticize the phrase *de minimis*, they accept the description that the requirements are " 'not onerous.' " ___ F.3d at ___ (quoting *Burdine*, 450 U.S. at 253), (Newman op. at 14 n.3) or "minimal" ___ F.3d at ___ (quoting *St. Mary's*, 509 U.S. at 506). (Newman op. at 14 n.3) And in this case they find that Fisher has made out a prima facie case of age discrimination on what in actuality is little more than a simple *McDonnell Douglas* showing that: 1) she was over forty years old; 2) she was qualified; 3) she was rejected; and 4) the position was given to another applicant with similar qualifications.[4] Yet the dissenters

[4] The dissent relies in part on the district court's finding that " 'all other tenured faculty who were equally or less qualified than Dr. Fisher were at least nine years younger than Dr. Fisher when they were tenured.' " ___ F.3d at ___ (quoting *Fisher v. Vassar College*, 852 F. Supp. 1193, 1230 (S.D.N.Y. 1994). (Newman op. at 58) To the extent that the district court found that some of these younger faculty members were not *as* qualified as the plaintiff, that finding manifestly suffers from flaws analogous to those I discuss in note 9, *infra*.

then assert that this showing is sufficiently correlated with discrimination to meet the *Henderson* test. In my opinion, it demonstrably is not.[5] Whether the dissenters do this because they believe that this showing really does point sufficiently to discrimination, or whether, instead, they are confused by the fact that this showing has been termed a "prima facie case," and that this phrase in other areas of the law implies evidence sufficient to sustain a jury verdict, is not for me to say. But if I am right that it isn't sufficiently correlated, then what they wish to do is forbidden by *Henderson*, and neither failing to call the factors *de minimis*, nor calling what the factors establish a "prima facie case" or an "inference," makes them right.[6]

Both of the ways out that I have suggested have problems. Making the requirement of a prima facie case strong enough so that it truly supports, without more, a fact-finding of discrimination, would, in my judgment, do two things that no one in the in banc court has recommended: (1) require the overturning of *Burdine* and *McDonnell Douglas* as well as a large number of deci-

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5 Whether this kind of prima facie case is enough when one also considers the added weight to be given to a defendant's pretextual answer is a question that I consider in Parts II and III, *infra*.

6 Judge Winter's opinion states that under *Burdine*, the fact that the "plaintiff was (1) a female (2) qualified for the job in question but (3) rejected (4) in favor of a male—is alone proof of 'circumstances which give rise to an inference of unlawful discrimination.' " ___ F.3d at ___ (quoting *Burdine* 450 U.S. at 253 n.6). (Winter op. at 3) But the use of the word "inference" in *Burdine* need mean no more than a temporary inference requiring defendants to explain, as in *Turnipseed*. And, more important, if the fact of a railroad derailment is insufficiently correlated with railroad fault to support a jury verdict of negligence "more probably than not" (as *Henderson* describing *Turnipseed* held), it is hard to understand how the mere hiring of a qualified male in place of a qualified female allows a finder of fact to say that the defendant "more probably than not" discriminated against women!

sions in this and other circuits; and (2) undercut the eminently reasonable requirement that defendants in Title VII cases be made to explain their actions relatively frequently.[7] But saying that a prima facie case is not enough to support a factfinding of discrimination has—as the dissents point out—its own problems. Mainly, it requires us to say that the term "prima facie case" is used differently in Title VII than elsewhere. And this is unpleasant. It is, nevertheless, the better solution.

It would have been nice if *Turnipseed* and *Henderson* had said that the plaintiffs there had made out a prima facie case of negligence sufficient to require the defendants to answer, but insufficient to support a jury verdict once an answer was given. They used different words instead. (Their words—conflating inferences and pre-

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[7] Judge Winter does suggest that, given the availability of discovery, the Supreme Court might wish to abandon the burden-shifting framework established in *Burdine* and *St. Mary's*. I, and here I speak only for myself and not necessarily for the majority which has joined this Part of my opinion, am skeptical. Too much blood has been, and continues to be, spilled over who has the burden of coming forward with the evidence, to give me confidence that, under modern pleading, it doesn't matter. Moreover, the enormous discretion given to a district judge over discovery makes the nature of the questions asked, and the specificity of the proffered answers, likely to be very different from the explanations brought forth by the *Burdine* and *St. Mary's* rules. It also suggests a very different role in the process for the Courts of Appeals. Finally, some—not necessarily I—may also question the appropriateness of the Supreme Court's abandonment of its longstanding interpretation of the relevant statutes, in the light of Congress's silent "acquiescence," emphasized by the subsequent enactment of another statute, the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101, *et seq.*), seemingly subject to the same rules. *See EEOC v. Amego, Inc.*, 110 F.3d 135, 145 n.7 (1st Cir. 1997) ("The ADA is interpreted in a manner similar to Title VII, and courts have frequently invoked the familiar burden-shifting analysis of *McDonnell Douglas* in ADA cases.") (citation omitted); *see also Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 68 & n.7 (3d Cir. 1996) (collecting cases from the First, Sixth, and Seventh Circuits).

sumptions—had their own problems.) But the point they made, and which the majority makes, is nonetheless the same, and it is a profoundly wise one. There are situations in which it makes sense to force the defendant to explain itself and its actions, once a plaintiff has shown facts which, *though too weak to demonstrate more probably than not that the defendant should be liable*, are nevertheless sufficiently linked to possible wrongdoing by the defendant to justify an explanation. In the end, whether one says that such a showing by the plaintiff gives rise to an inference, a temporary presumption, or a prima facie case (or, for that matter, Thucydides or Mustard Plaster) is relatively unimportant. What counts is that we not let verbal confusions keep us from the result that Title VII—as long interpreted by the courts—seeks to achieve: that the plaintiff can force an explanation out of the defendant with relative ease, but that the defendant can only be held liable (once an answer is given) when a finding of discrimination is truly supported by the facts. The majority stays true to that course, and I therefore join it in this respect.

II.

What significance is to be given to the fact that the explanation given by the defendant is pretextual? One might have thought that the requirement of an answer would mean that an *honest* answer was required, and that absent an honest answer the defendant should be treated as having given no answer at all. That position was, of course, rejected by *St. Mary's*. *See St. Mary's*, 509 U.S. at 509. (Indeed, that is the *only* one of the many important statements in *St. Mary's* that is holding and not dictum.) Some may find that holding paradoxical. There is,

however, a plausible explanation for it,[8] and in any event, we are bound to follow it.

I cannot doubt that the existence of a pretextual explanation, without more, points in the direction of discrimination. It does not weaken, and must at least minimally, and potentially forcefully, strengthen the evidence of discrimination that the plaintiff originally adduced. It was in part because the panel seemed to deny this that I, and I believe others as well, voted to rehear this case in banc.[9] On this issue, unlike the issue of the prima facie case, there is now at least verbal agreement, among all members of the in banc court. (That agreement may, however, mask a division on how much weight in practice should be given to a pretextual answer.) The members of the panel have joined an opinion stating that their original comment that a pretext finding "points nowhere" was a rhetorical device, ___ F.3d at ___, (Majority op. at 39) and the dissenters agree that the importance of a pretextual explanation varies from virtually nil, in some circumstances, to great in others, ___ F.3d at ___. (Newman op. at 28-33) All in all, I find the current discussion of pretext in Part II(b) of the majority opinion satisfactory, and so I join it. I add a few

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[8] The majority in *St. Mary's* presumably believed that making a defendant answer is a matter of crucial importance (despite the availability of discovery) since any answer—even, or perhaps especially, a false one—helps a plaintiff to look for, and maybe find, those facts that if proven demonstrate discrimination. This aim, which is also central to the majority's interpretation of the *Burdine-St. Mary's* requirements, explains why *St. Mary's* deems any answer, including a *false* one, sufficient to meet those requirements.

[9] The other issue that moved me, and others, to vote for an in banc rehearing was what has at times been described as the appellate reviewability of a factfinder's ultimate determination of discrimination, but is in fact the significance to be given to the plaintiff's prima facie case in such review.

words of explanation, however, because they will serve to explain, to some degree, my disagreement with the majority on points three and four.

I begin by making explicit what is implicit in both the majority opinion and in Chief Judge Newman's dissent—that the strength of the pretext, and therefore the amount of evidence required to counter it,[10] depends on context. This is, in part, because pretexts come in many varieties. Consider the following two examples:

> *Example 1:* A university says that it denied someone tenure because she did not publish enough articles. It turns out that this is a lie—she published as many as those promoted, and the university knew it.
>
> *Example 2:* A university says that it denied someone tenure because she was too aggressive to fit in. It turns out that this is a lie—males promoted were manifestly as aggressive.

The first example points to discrimination, but weakly. It does so only because a lie suggests an ulterior motive, and in the context of a claim brought—and a prima facie case made—under Title VII, the existence of any ulterior motive is some evidence of discrimination. The second example offers stronger evidence of discrimination. It is not only a lie, but a lie linked to a discriminatory stereotype—namely, that women are and ought to be less aggressive than men. Many other examples of even

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[10] Since I believe that a pretext always starts out pointing in the direction of discrimination, I will speak of what kind of evidence is needed to counter that vector. In this respect, I may sound rather more like the dissent than the majority opinion that I join. But since I also believe that an uncountered pretext added to the plaintiff's prima facie case need not be sufficient to support an ultimate finding of discrimination, I do not require that the pretext be countered to permit a judgment, as a matter of law, of no discrimination. Accordingly, I join the majority's discussion.

stronger and weaker pretexts could be given, and all pretexts can be seen as arrayed on a continuum ranging from those that provide the weakest support for a finding of discrimination to those that provide the strongest support.

Under *St. Mary's*, *any* pretext permits (but does not require) a finding of discrimination that will be upheld on appeal unless such a finding is clearly erroneous.[11] *See St. Mary's*, 509 U.S. at 524. But whether a finding is clearly erroneous necessarily depends on the nature of the pretext as well as on what other evidence of discrimination has been presented. Where the pretext points strongly to specific discrimination, the existence of a "third reason" or clear evidence of a lack of discriminatory intent may well be required to counter the inference of discrimination. Where the pretext points only weakly or indirectly toward discrimination, evidence of non-discrimination may be much more general. Such evidence may, for example, amount to no more than hints of possible third reasons together with the existence of a generally non-discriminatory attitude or history on the part of the employer. And this would be especially so if the prima facie case for discrimination is—as it can frequently be in Title VII cases—minimal.

Based on this discussion of pretext and the preceding one of the prima facie case, we can formulate a standard for the weight to be ascribed to each. One could summarize the relevant standard—in the first instance for the trier of fact but subject to the normal rules of review—by making seven points. First, all pretexts point toward a discriminatory motive and, if uncontroverted, tend to support (but do not require) a finding of discrimination.

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[11] Once again, this in no way alters the fact that the risk of non-persuasion rests on the plaintiff.

Second, all pretexts may be countered by sufficient evidence of non-discrimination. Third, all pretexts do not give equal support to a finding of discrimination. Fourth, the quality and quantity of the evidence deemed sufficient to counter a pretext will depend on the pretext's nature—weak or general evidence will suffice to overcome a pretext that gives rise only to a weak inference of discrimination, while strong and specific evidence will be required to counter a pretext that gives rise to a strong inference. Fifth, what evidence is sufficient depends also on the strength of the prima facie case and of the other evidence for discrimination that has been introduced. Sixth, it is therefore erroneous to believe that all pretexts can be overcome only by certain types of "strong" evidence (*e.g.* specific evidence of third reasons or specific evidence of a mistaken belief that the plaintiff was in the allegedly favored category). This is particularly true because of the *de minimis* nature of the prima facie case in the employment discrimination context. Seventh, quite apart from whether the pretext is countered or not, once the defendant has answered the plaintiff's prima facie case by giving an explanation, even if that explanation is pretextual, the plaintiff's case stands on its own and can be tested for sufficiency by an appellate court. The fact, in other words, that the plaintiff has made out a *Burdine-St. Mary's* prima facie case, and that the defendant has strengthened that case by giving a pretextual explanation, may, but need not necessarily, mean that a factfinder's determination of discrimination can stand.

III.

The majority modified the order granting this rehearing in banc to provide that the rehearing was "limited to the force and effect of a pretext finding, taken together with a prima facie case, in considering on appeal whether or not an ultimate finding of discrimination is clearly erroneous under Fed. R. Civ. P. 52(a)." ___ F.3d at ___. (Majority op. at 44) Because it found that the in banc rulings on these issues of law were consistent with the rules employed by the panel, the majority deferred to the panel's assessment of the facts. While I do not believe that the majority had an obligation to engage in its own independent assessment of the facts, I think that it would have been prudent for it to do so. This is so because I find the question quite close on the facts, and also because I sense that an engagement with the facts might have clarified at least part of the disagreement between the majority and Chief Judge Newman's dissent on the weight to be given, in practice, to a finding of pretext.

Assuming we accept the principles set forth in Parts I and II of this opinion, we still have to decide whether *in this case* the evidence of non-discrimination is sufficient to counter the suggestion of discrimination that arose from Vassar's dissembling, and more generally whether taking the plaintiff's and the defendant's evidence as a whole, Judge Motley's finding of discrimination is clearly erroneous. I find this question close, in part because the strength of the suggestion of discrimination raised by Vassar's lie is less easily gauged than in many cases. Vassar's pretext could be viewed as just a lie, or as a lie that derives from a discriminatory stereotype. Vassar incorrectly claimed, for example, that Fisher did not spend enough time in the lab. Was this a simple lie

or was it based on a stereotypical view that married women with children spend less time in the lab?[12] I also find the question close because—like the panel—I believe the district court erred in some of its findings, and I am unsure of the full significance of those errors.

Under the circumstances, I therefore agree with the dissenters' conclusion that the in banc court should not defer to the original panel's determinations. I emphasize, however, that I do so only on the grounds of prudence. The deference accorded to the panel by the in banc court is perfectly legitimate—I simply think it is unwise.

IV.

The final question is whether a reversal of the trial court's finding of discrimination is warranted. Were I the finder of fact, and were I forced to decide at this stage of

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[12] Judge Jacobs in his separate opinion suggests that while there *could* be a stereotype that *married* women with children spend less time in labs than *unmarried* women with children, there is no evidence in the record "that Vassar's decisionmakers were in the grip of such a stereotype." ___ F.3d at ___. (Jacobs op. at 7) I do not pretend to have spent anywhere near as much time examining the record as Judge Jacobs has, *see infra* Part IV. As a result, I will assume, *arguendo*, that he is correct that such evidence is lacking.

At most, however, that would raise an interesting question. In determining whether to give more weight to a pretextual answer because it is linked to an offensive stereotype, must one show that the defendant who gave the false answer is "in the grip of such a stereotype," or is it enough simply to show that the offensive stereotype is plausible? Obviously, if one can show the former, the pretext points more strongly in the direction of discrimination than if one can only show the latter. But I am inclined to think that even a bare finding that a false answer is plausibly connected to an offensive stereotype makes that false answer considerably more probative of discrimination than a pretextual answer that is unconnected to such a stereotype. This means that the only thing needed to raise a doubt as to whether something was a simple lie or was based instead on a stereotypical view is that the pretext be plausibly connected to the stereotype. Judge Jacobs concedes that such a plausible connection exists in this case, and that is all my argument requires.

the proceedings, I think that I would not have found that the plaintiff had met her burden of proving discrimination. I believe the prima facie case is very weak, that little additional evidence of discrimination has been presented, that the pretext is "semi-strong," and that there is sufficient generalized countervailing evidence to overcome both the pretext and the other evidence supporting discrimination. At the same time, applying the ordinary rules of review for clear error, I am far from sure that I would find the district court's determination of discrimination to be clearly erroneous.

Either conclusion would require a far deeper examination of the record than I have made. I do not need to make that examination, however, given the majority's decision to defer to the panel. I agree with the panel that at least in some instances the district court erred in how it went about finding discrimination. But I do not know whether, once these errors are corrected, the district court on remand would or would not find that the plaintiff met her burden of proving discrimination. Thus, I am not ready to assume, as Chief Judge Newman's dissent seems to do, that sending the case back for a reconsideration free of errors would necessarily lead to the same result. ___ F.3d at ___. (Newman op. at 55) Indeed, I believe that such a view gives insufficient credit to the distinguished district judge who has heard this case. But I am also not ready to conclude, as did the panel (and, in effect, the majority), that—cleansed of error—there would be insufficient evidence of discrimination, and therefore that any finding of discrimination would require reversal on appeal.

For these reasons, I would have the in banc court either itself undertake a thorough examination of the alleged errors of the district court or remand the case to

the panel for such an examination.[13] Thereafter, the district court would be instructed to reconsider its holding, in the light of these errors. Finally, I would put off any determination as to whether the ultimate finding of the district court was sustainable under clear error review, until I had before me its new and reconsidered decision (whatever that might be).

Accordingly, while I concur in Parts II(a), II(b), II(c), II(d), and IV of the majority opinion, I would vacate the judgment of the district court, and hence respectfully dissent from the in banc court's reversal of that judgment and from its award of judgment to the defendant.

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[13] Because of the disposition of the case, it would only waste time to go over each of the alleged errors. I will point out one, that actually goes primarily to the existence of a pretext rather than directly to the ultimate question of discrimination. I do so because it is an error that is frequently made in cases of this sort. The district court concluded that the finding by Vassar that the plaintiff had not published in top journals was false because the plaintiff had published in a series of reviews that the district court believed were leading scholarly journals. But what are first-class reviews is not for the district court to determine. That is, Vassar has a perfect right to decide for itself what its standards are and it may premise promotion on publication in a journal that the district court thinks is awful. Vassar has no right to characterize a set of publications as top reviews in one case but not in another, unless there are plausible non-discriminatory reasons for the change. An absence of such reasons would, in itself, be evidence of a pretext. But that is not what the district court seems to have found here. What the court did was to set the standards for the employer, rather than let the employer set its own (non-discriminatory) standards. And that is always pernicious. It is particularly pernicious in academic contexts, where, second only to athletics, we all think that we are better coaches than the coaches themselves. *Cf. Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) (Friendly, *J.*).

Judges Miner, Walker, McLaughlin, Jacobs, Leval, and Parker authorize me to say that they agree with these observations.

JON O. NEWMAN, *Chief Judge*, with whom Kearse, Winter, and Cabranes concur, dissenting:

The result of this rehearing in banc is the entirely unwarranted rejection of a trial judge's ultimate findings of discrimination against married women and age discrimination in the denial of tenure to a college professor, even though those ultimate findings are supported by facts establishing a prima facie case of discrimination on both grounds, by a sustainable finding that the employer's proffered reason for denying tenure was pretextual, and by additional sustainable findings pointing to discrimination. This result is accomplished by a combination of actions of the in banc court and the panel that originally decided this appeal. Though I do not doubt that, in some Title VII and ADEA cases, an ultimate finding of discrimination may properly be ruled clearly erroneous despite a valid finding of pretext, there is no basis for such a ruling on this appeal.

I respectfully dissent, not only because of disagreement with the outcome of this appeal, but, more significantly, because the combined rulings of the in banc majority and the panel depart from settled law and practice in several respects concerning discrimination law, appellate review, and in banc practice. One of the most bizarre aspects of the majority's opinion is its insistence that the in banc court is deciding only a very narrow issue even as the majority opinion advances significant views on matters far beyond the narrow issue identified. The majority says that the in banc court is deciding only the issue of "whether a finding of liability under Title VII, supported by a prima facie case and a sustainable finding of pretext, is subject to review for clear error." ___ F.3d at ___. That issue was never in question, since findings of discrimination had always been subject to

"clear error" review, and the Supreme Court had confirmed the availability of such review, prior to this in banc rehearing, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Beyond reasserting the obvious availability of "clear error" review, the in banc majority undertakes to express several views concerning the significance (or lack of significance) of a prima facie case, a finding of pretext, and the combination of both in the context of discrimination cases.

Understanding the reasons for my disagreement with the majority requires separate consideration of (1) what the majority has said about discrimination law, especially the significance of a prima facie case and the significance of a finding of pretext, (2) the role of an appellate panel in reviewing the factual findings of a district court, (3) the role of an in banc court in relation to the panel whose decision is being reheard, and (4) the panel's consideration of the merits of Dr. Fisher's claims of discrimination. Since these issues relate primarily to Dr. Fisher's claim of discrimination against her as a married woman, I consider them in that context, and discuss thereafter her age claim.

A. The Claim of Discrimination Against Married Women

1. Discrimination Law and the Significance of a Prima Facie Case and a "Pretext" Finding

(a) *The Significance of a Prima Facie Case.* The majority asserts that a "prima facie case" under Title VII, assessed without regard to the persuasive force of any opposing evidence, is not necessarily sufficient to take the ultimate issue of discrimination to the fact-finder. In the majority's view, a Title VII prima facie case serves only to require the defendant to proffer an

explanation for its adverse action; upon lack of such a proffer, the plaintiff is entitled to judgment as a matter of law. But, says the majority, if the defendant proffers an explanation, the plaintiff's prima facie case is not necessarily sufficient to take the case to the fact-finder, *i.e.*, to support an inference of discrimination. Though I recognize that the facts of a plaintiff's prima facie case might be so undermined or so overwhelmed by opposing evidence that no reasonable fact-finder could find discrimination, I disagree with the view that the facts of a prima facie case, assessed without regard to opposing evidence, are insufficient to support an inference of discrimination.

The phrase "prima facie case" has long been recognized to have two meanings. It usually means evidence sufficient to *permit* (but not require) a fact-finder to find a disputed matter in favor of the party presenting the prima facie case. This is the prima facie case that creates a permissible inference. In some limited circumstances, it can mean, in addition, evidence sufficient to *require* a finding of a disputed matter in favor of the party presenting the prima facie case in the absence of a proffer of evidence by the opposing party. This is the prima facie case that creates a rebuttable presumption. The Supreme Court made it clear in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), that in the Title VII context, the Court was using the phrase "prima facie case" to mean evidence that creates a rebuttable presumption. *See id.* at 254 n.7.

But, as Judge Winter's dissenting opinion points out, the prima facie case that creates a rebuttable presumption is an even stronger version of the concept of a prima facie case than the version that only permits an inference. Moreover, the Supreme Court in *Burdine* defined

a Title VII prima facie case to mean adverse employment action taken "under circumstances which give rise to an inference of unlawful discrimination."[1] *Id.* at 253 (footnote omitted). The four subsidiary facts given in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), as an example of a prima facie case of discrimination are not four isolated bits of information plucked from the air. They are the Supreme Court's own example of facts sufficient, in the Supreme Court's words, to "give rise to *an inference of unlawful discrimination.*" *Burdine*, 450 U.S. at 253 (emphasis added). Since those facts are sufficient to give rise to an inference of discrimination, they cannot cease to have such an effect simply because the employer has proffered an explanation. That proffer defeats the presumptive effect that the four facts would have had in the absence of an explanation (*i.e.*, the plaintiff is no longer entitled to judgment as a matter of law once the four subsidiary facts have been proven), but it does not deprive these facts of their capacity to support

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1 *Burdine* states:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.[6]

Burdine, 450 U.S. at 253. Footnote 6 then quotes the four subsidiary facts from *McDonnell-Douglas*—plaintiff belongs to a racial minority, plaintiff applied for and was qualified for a job for which applicants were sought, the plaintiff was rejected, and the employer continued to seek applicants from person's with plaintiff's qualifications—and describes them as "an appropriate model for a prima facie case of racial discrimination." *Id.* n.6.

The reason that some courts say that a prima facie case of discrimination requires the four facts illustrated by *McDonnell Douglas* (or variants of them), while other courts describe a prima facie case as adverse employment action under circumstances giving rise to an inference of discrimination is because the four facts *are*, in the Supreme Court's view, facts sufficient to support an inference of discrimination.

an inference of discrimination if the fact-finder finds these facts proven and then chooses to draw such an inference. The Supreme Court explicitly made this point in *Burdine*:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

Burdine, 450 U.S. at 255 n.10. There is simply no way to reconcile the Supreme Court's statement in *Burdine* that the four facts of a prima facie discrimination case are facts sufficient "to give rise to an inference of unlawful discrimination" and the majority's assertion that "[t]he fact that a plaintiff is judged to have satisfied these minimal requirements [of a prima facie case] is *no indication* that, at the end of the case, plaintiff will have enough evidence of discrimination to support a verdict in its favor." ___ F.3d at ___ (emphasis added).

The capacity of facts supporting a rebuttable presumption to permit the inference of the ultimate fact even after the opposing side has proffered an explanation was explicitly recognized by Congress in adopting Rule 301 of the Federal Rules of Evidence, a rule the Supreme Court cited in *Burdine* in explaining a Title VII rebuttable presumption. *See Burdine*, 450 U.S. at 255 n.8. Rule 301 provides:

> In all civil actions . . . a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the

> burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally case.

Fed. R. Evid. 301.

The Conference Report explaining this Rule states:

> Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. *The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.*
>
> The conference adopts the Senate amendment.

H.R. Conf. Rep. No. 93-1597, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099 (second emphasis added).

Indeed, if the facts constituting a Title VII prima facie case could *not* permit an inference of discrimination (and in the majority's view they sometimes do not), then it is very likely that these facts could not constitutionally have the presumptive effect that *McDonnell Douglas* and *Burdine* hold that they have in the absence of a defendant's proffered explanation. The Supreme Court's rebuttable presumption jurisprudence long ago established that a presumption of "one fact from evidence of another" will satisfy due process requirements only if

"there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U.S. 35 (1910). *Turnipseed* considered the constitutionality of a state statute providing that "proof of injury inflicted by the running of locomotives or cars of [a railroad] company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company." *Id.* at 41. The Court understood the statute to cast upon the railroad the burden of producing some evidence disputing its negligence, without which the defendant would lose as a matter of law. The Court upheld the constitutionality of the statute because "its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference" and because there was "some rational connection between the fact proved and the ultimate fact presumed." *Id.* at 43.

Though some might view *Turnipseed* as a case that permitted a rebuttable presumption that was sufficient to impose liability in the absence of a defendant's proffer of opposing evidence, but was created by facts insufficient in themselves to carry a case to a fact-finder, *i.e.*, the fact of injury and the fact that the injury was inflicted by a train, the Supreme Court thought otherwise: "It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation." *Id.* at 44.[2]

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[2] Subsequently, the Supreme Court held unconstitutional a presumption against railroads that shifted to a railroad defendant the burden of *proving* that an accident caused by its equipment was not the result of neg-

The requirement of *Turnipseed*, that it must be reasonable to infer the presumed fact from the proven facts, was subsequently invoked to invalidate rebuttable presumptions in a series of criminal cases, beginning with *Tot v. United States*, 319 U.S. 463 (1943). *Id.* at 467-68. *Tot*, it will be recalled, involved a statute that made possession of a firearm by a convicted felon "presumptive evidence" that the firearm was transported or received in interstate commerce by the felon. That the Court viewed the presumption as rebuttable merely by the proffer of opposing evidence is made plain by the Court's statement that the statute "leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence." *Id.* at 469. This rebuttable presumption was invalidated as in conflict with due process because, in the absence of a proffer of opposing evidence (which need not have been proven), it permitted inference of an ultimate fact that was not rationally connected to the facts that were proved.

The Supreme Court subsequently applied *Tot* to invalidate rebuttable presumptions in *United States v. Romano*, 382 U.S. 136 (1965) (rebuttable presumption of control of still from presence at still), *Leary v. United States*, 395 U.S. 6, 29-54 (1969) (rebuttable presumption of illegal importation of marijuana from possession of marijuana), and *Turner v. United States*, 396 U.S. 398,

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ligence. *Western & Atlantic RR. v. Henderson*, 279 U.S. 639 (1929). Though this shift of a burden of proof distinguished the rebuttable presumption in *Turnipseed*, the Court also pointed out that "[t]he mere fact of a collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for *any inference* as to whether the accident was caused by the negligence of the railway company or the traveler on the highway or of both or without fault of anyone. *Id.* at 642-43. Thus, as in *Turnipseed*, the Court continued to be concerned with the reasonableness of inferring the presumed fact from the proven facts.

418-19 (1970) (rebuttable presumption of illegal importation of cocaine from possession of cocaine). *Leary* explained that rebuttable presumptions are valid only where "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary*, 395 U.S. at 36 (footnote omitted). *Leary* also made clear that the Court's "more likely than not" test for rebuttable presumptions was not influenced by the context of a criminal case in which guilt must be proved beyond a reasonable doubt. The Court said that the rebuttable presumption was invalid for failure to pass the "more likely than not" test without reaching the further question of whether the presumption would be valid to meet the "reasonable doubt" standard. *Leary*, 395 U.S. at 36 n.64.

Since a rebuttable presumption is constitutionally valid only where "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact," *Leary*, 395 U.S. at 36, it necessarily follows that the rebuttable presumption that the Supreme Court applied to Title VII cases in *McDonnell Douglas* and *Burdine* is based on subsidiary facts from which it can be said with substantial assurance that the presumed fact of discrimination is more likely than not to flow. Surely, the Supreme Court did not create in *McDonnell Douglas* and *Burdine* a rebuttable presumption that was unconstitutional under *Turnipseed*, *Tot*, and *Leary*. It also necessarily follows that the facts that suffice to create the *McDonnell Douglas/Burdine* rebuttable presumption are facts from which a reasonable trier may infer discrimination. Since these facts will support a constitutionally valid rebuttable presumption only if it is more likely than not that the ultimate fact—discrimination—flows from the subsidiary facts, it must be rea-

sonable for a trier to draw the inference of that ultimate fact. Thus, the facts that support the rebuttable presumption in Title VII cases must also be sufficient to create a prima facie case in the lesser and ordinary sense that they suffice to permit a fact-finder to find the ultimate fact of discrimination in the plaintiff's favor.

Brushing aside the caselaw on rebuttable presumptions, the majority nonetheless asserts that "prima facie case" in Title VII has a third meaning, one far weaker than the only two identified by the Supreme Court in *Burdine*, 450 U.S. at 254 n.7. In the majority's view, a Title VII "prima facie case" starts out meaning facts sufficient to create a rebuttable presumption and then, upon the proffer of an explanation by the defendant, becomes a set of facts that only sometimes permits a fact-finder to infer discrimination. Though the majority does not say that the facts establishing a prima facie case of discrimination are *always* insufficient to get to a fact-finder, it does assert that since such a prima facie case is relatively easy to present, such facts, though supported by evidence, will sometimes be insufficient even to create a factual issue as to discrimination. In the majority's words:

> [A] plaintiff alleging discrimination satisfies the prima facie case and avoids dismissal at the conclusion of the plaintiff's direct case *without* submitting evidence sufficient to support a finding in his favor on each element that the plaintiff must ultimately prove to win.

___ F.3d at ___ (emphasis in original). The majority has thus embraced a novel concept—the insufficient prima facie case.

The majority views a prima facie discrimination case as a collection of facts that always suffices to pry an explanation out of a defendant on pain of suffering an adverse judgment if no explanation is proffered and only sometimes also suffices to permit a jury to infer discrimination. The Supreme Court has never so characterized a prima facie discrimination case. It is true that the Court has characterized the burden of establishing a prima facie of discrimination as "not onerous," *Burdine*, 450 U.S. at 253, but it has not said that facts constituting a prima facie case, if not undermined by opposing evidence, are insufficient to permit an inference of discrimination. In *Burdine*, the Court said precisely the opposite.

St. Mary's made the further point that, after a defendant has proffered an explanation and thereby removed the presumptive force of the plaintiff's prima facie case, the prima facie case does not compel *a directed verdict* in the plaintiff's favor. *St. Mary's*, 509 U.S. at 515 (emphasis added). That is because the fact-finder must decide whether or not to draw the inference of discrimination from the facts constituting the prima facie case. But though *St. Mary's* quite understandably values the prima facie case at less than what is required to obtain a directed verdict, it does not reduce it so far as to say, as the majority here holds, that a prima facie case, even where its constituent facts are credited, sometimes might not even get to a fact-finder for decision. Thus, the Supreme Court is content to say that, after a defendant proffers an explanation, even a false one, a prima facie case does not guarantee the plaintiff a victory. The majority here says that a supportable prima facie case does not even guarantee the plaintiff an opportunity to have the fact-finder consider the case.

Some of the confusion in this area of the law stems from the way the Supreme Court has articulated the *McDonnell Douglas/Burdine* analysis and the lower courts have applied it. *McDonnell Douglas* identified four factors that were present in that case and sufficed to constitute a prima facie case. The sentence identifying the four factors carried an important footnote, which is often overlooked. It says:

> The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas, 411 U.S. at 802 n.13.

Then in *Burdine* the Court generalized the test for a prima facie case by stating that the plaintiff "must prove by a preponderance of the evidence" adverse action taken "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. Again, the Court added a footnote of explication. It referred to the four factors that had sufficed in *McDonnell Douglas* as "an appropriate model for a prima facie case of racial discrimination," explained again that "this standard is not inflexible," and quoted from footnote 13 of *McDonnell Douglas* the important language that " '[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect in differing factual situations.' " *Burdine*, 450 U.S. at 253 n.6 (quoting *McDonnell Douglas*, 411 U.S. at 802 n.13).

These were important qualifications to be relegated to footnotes, and some courts might not have always kept them in mind. Thus, some courts repeat the four factors

that were given in *McDonnell Douglas* as an example appropriate for *that* case and seem to regard them as always enough for a prima facie case, even though the different fact patterns such courts are confronting might not meet *Burdine*'s general test of "circumstances which give rise to an inference of unlawful discrimination." And some courts, including ours, have said that the prima facie case may be "*de minimis*," a phrase not normally associated with a prima facie case sufficient to take the ultimate issue to a fact-finder.[3] However, even when we have labeled a prima facie case "*de minimis*," we have usually, perhaps always, done so with respect to a fact pattern that met *Burdine*'s standard of "circumstances which give rise to an inference of unlawful discrimination." *See, e.g., Chambers v. TRM Copy Centers*, 43 F.2d 29, 37 (2d Cir. 1994) (collecting cases upholding plaintiff's prima facie case).

Focusing on the four factors, without regard to the precise facts of a case, is what has led the majority to believe that we in the dissent favor subjecting employers "to liability for discrimination where none was present and none was shown." ___ F.3d at ___. The majority attributes that view to us because they assume that we think a prima facie case of discrimination is established whenever the four factors illustrated in *McDonnell Douglas* are met, regardless of what facts the plaintiff presents to establish the prima facie case. That is not our view. We take seriously the caution in *McDonnell Douglas*, repeated in *Burdine*, that the facts "necessarily will vary in Title VII cases," and that the "specification" of "prima facie proof required" in

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[3] The Supreme Court has never called a Title VII prima facie case "*de minimis*." *Burdine* called it "not onerous," 450 U.S. at 523, and *St. Mary's* called the requirements "minimal," 509 U.S. at 506, which may simply mean at the low end of a traditional range.

McDonnell Douglas "is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

The majority mischaracterizes our view in saying that we think an employer may be found liable without evidence of discrimination. We believe that a prima facie case requires, as the Supreme Court said in *Burdine*, adverse employment action taken "under circumstances which give rise to an inference of unlawful discrimination," *Burdine*, 450 U.S. at 253, and that if such a prima facie case is presented, and if, at the end of the trial, the inference remains reasonable despite the defendant's evidence, then, as the Court said in *St. Mary's*, "no additional proof of discrimination is required," *St. Mary's*, 509 U.S. at 511 (brackets and emphasis omitted), and the case goes to the fact-finder for decision. The facts in *McDonnell Douglas* sufficed to support such an inference; a qualified Black was rejected and the employer sought other workers with no better qualifications.[4] The facts also sufficed in *Burdine*, where a qualified woman was rejected, and after several months, the position was filled by a male who had been under her supervision. *Burdine*, 450 U.S. at 254 n. 6. The facts will not necessarily suffice every time a member of some protected class is rejected. The precise facts, not the rote repetition of the four factors, determine whether a prima facie case, sufficient to support an inference of discrimination and thus to permit a finding of liability, has been presented.

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[4] Even these facts would not necessarily suffice in all circumstances. For example, if the employer had a predominantly Black work force, the rejection of one Black applicant would most likely not give rise to an inference of discrimination.

In any event, I believe that the Supreme Court wishes to recognize a prima facie case under Title VII only when the facts presented support a reasonable inference of discrimination. Whatever confusion in such terms as "inference" and "presumption" might have existed when the Court decided *Henderson* in 1929, the Court that decided *Burdine* in 1981 and *St. Mary's* in 1993 understood that an inference permits, but does not require, finding an ultimate fact from a predicate fact or facts.[5] That is why a Title VII prima facie case can exist only when the predicate facts support a reasonable inference

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[5] It is true that *Burdine* quoted a prior opinion to the effect that "the prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' " *Burdine*, 450 U.S. at 254 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Some might think this means that the inference available from the prima facie case is no longer available whenever the acts are explained. I believe the Court meant, as it said, that we "presume" discrimination if the acts remain unexplained; once we have the defendant's explanation, we no longer presume discrimination, but a reasonable fact-finder may infer it, unless the entire evidence makes the inference unreasonable.

I acknowledge, however, that this sentence can be read to mean that the defendant's proffer of an explanation has two consequences: it causes the disappearance of the mandatory presumptive effect of the prima facie case, and it also renders the prima facie case no longer necessarily sufficient even to support a permissible inference of discrimination. That reading would deprive the word "inference" of its normal meaning and essentially equate it with the word "presumption." The quoted sentence is also problematic because it seems to say that the inference from the prima facie case is available because of the presumption, yet most presumption cases, including the Supreme Court's opinions in *Turnipseed*, *Tot*, and *Leary*, make the reciprocal point that a mandatory rebuttable presumption is available only because facts permit a reasonable inference. Whether an inference is permissible normally depends only on the reasonableness of inferring an ultimate fact from proven subsidiary facts, not on whether in some limited circumstances those subsidiary facts are accorded the extra force of triggering a mandatory rebuttable presumption that disappears upon the opposing side's proffer of an explanation.

of discrimination. As the Court has cautioned, however, the fact patterns that meet that standard will vary from case to case.

Of course, a prima facie case of discrimination might cease to have its normal effect of permitting a jury to infer discrimination in some circumstances. But these instances can arise only where (a) the evidence in the entire record is such that no reasonable fact-finder could find to be true the facts presented by the plaintiff as constituting the prima facie case (*e.g.*, the evidence indisputably shows that the plaintiff is unqualified), or (b) the evidence in the entire record points so strongly away from discrimination (or toward a third reason) that no reasonable fact-finder could infer discrimination. The elimination of a prima facie case in such circumstances, either by being indisputably undermined or indisputably overcome, can occur only where evidence provides a basis for such conclusions. The prima facie case, sufficient in the Supreme Court's view to permit an inference of discrimination, cannot, in the absence of undermining or opposing evidence, cease to permit the inference just because a majority of this Court believes, without reference to such evidence, that the inference ought not to be drawn.

(b) *The Effect of a Finding of Pretext.* Having embraced a new and weak meaning of "prima facie case," the majority then compounds its error by substantially downgrading the effect of a finding of pretext. In this case, the trier of fact found that Vassar's proffered reason for denying Dr. Fisher tenure was a pretext. The proffered reason, as acknowledged by the majority, was that Dr. Fisher "did not meet the posted standards for tenure, and that she was less qualified than other candidates who filled specific needs of the Biology Depart-

ment."[6] ___ F.3d at ___. The panel opinion concluded that the District Court's finding of pretext was sustainable, *Fisher v. Vassar College*, 70 F.3d 1420, 1437 (2d Cir. 1995) ("*Fisher II*"), and the majority opinion, by disclaiming any consideration of the panel's assessment of any of the District Court's findings, leaves undisturbed the critical panel ruling that the pretext finding is *not* clearly erroneous.

Some of what the in banc majority says about a pretext finding is not in dispute. We all agree that a finding of pretext *permits* the fact-finder to draw an inference of discrimination. As the Supreme Court explicitly stated, "[R]ejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required*." *St. Mary's*, 509 U.S. at 511 (internal quotation marks, footnote, and brackets omitted; emphasis in original). We also agree that the fact-finder *need not* infer discrimination after finding the proffered reason to be a pretext. The inference is available, not required.

We begin to part company when the majority offers its analysis of what a pretext finding means. The majority begins its analysis by pointing out that a pretextual reason for justifying adverse employment action might be advanced for a variety of reasons. The majority correctly observes that decision-makers might "intentionally dissemble" to hide such true reasons as "back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility." ___ F.3d at ___.

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[6] The majority properly identifies Vassar's proffered reason from the record as a whole. *See St. Mary's*, 509 U.S. at 522-23 (proffered reason "set forth 'through the introduction of admissible evidence,' " rather than in formal pleading) (quoting *Burdine*, 450 U.S. at 255).

Such reasons, the majority points out, are non-discriminatory. To this unexceptional starting point, the majority then adds the equally indisputable point that the probative force of a pretext finding on the ultimate issue of discrimination is not a fixed value, but varies depending upon the circumstances of each case.

The majority then introduces three considerations to justify its view that the pretext finding in this case may properly be given slight, if any, probative force. Each consideration risks weakening the law of discrimination, at least in the context of university tenure decisions. First, the majority relies on the large number of reasons why a pretext explanation could be proffered as a circumstance for diminishing the force of the pretext finding that was made by the District Court. But *numbers* of possibilities have little to do with probative force, as can be readily demonstrated by consideration of a common instance of a permissible finding of state of mind—the inference of consciousness of guilt from flight from the scene of a crime. A person running from a crime scene might have done so for many reasons. He might be late for a doctor's appointment, or a date with a friend, or any other important event; he might have just remembered that he left the oven on in his apartment, or the shower running; he might have heard a loud noise and thought there was some explosion endangering him; or he might just be a jogger who runs around that block every morning. The majority apparently believes that whenever a number of possible explanations can be suggested for conduct that normally has probative significance, the probative force of the conduct diminishes, triers of fact should be wary of attaching significance to it, and appellate courts should be emboldened to reject as clearly erroneous an ultimate finding that relies in

part on a normally available inference drawn from such conduct.

This view of the law is totally unsupported and unsupportable. In every case where a person is seen running from the scene of a crime, the jury is instructed that they may, but need not, draw an inference that such flight is probative of consciousness of guilt, and that state of mind, in turn, is probative of ultimate guilt (though not alone sufficient to convict). Of course, the strength of the inference from flight will depend on all of the evidence in the case. If there is some slight evidence of an innocent explanation for the flight, the inference of consciousness of guilt might be lessened. If the evidence of an innocent explanation is strong, the inference of consciousness of guilt will be weak. And cases might arise where the evidence of an innocent explanation is so strong that no reasonable fact-finder could draw the inference of consciousness of guilt, in which event a finding based on the inference would be clearly erroneous.

To assert these self-evident propositions is not to suggest, as the majority says of this dissent, ___ F.3d at ___, that I favor assigning a "fixed" or "special" value to a proffer of a pretextual explanation for an adverse employment decision. I do not. I simply observe, as every appellate court that has ever had a pretext case has observed, that a finding of pretext will normally permit (not require) an ultimate finding of discrimination, that the *possibility* that other explanations can be imagined is not a valid reason for depreciating the significance of a pretext finding, and that an appellate court cannot validly point to such possibilities as a basis for declaring clearly erroneous a trial court's decision to infer discrimination from a finding of pretext.

The majority then amplifies its argument about multiple possible explanations by stating that a pretext finding is to be accorded "minimal" significance "if, *on examination of the circumstances*, there are many possible reasons for the false explanation, stated or unstated, *and illegal discrimination is no more likely a reason than others*." *Id.* at ___ (emphasis added). This statement is offered in an effort to provide an explanation of what the panel meant by its extraordinary statement that the District Court's pretext finding "points nowhere." *See Fisher II*, 70 F.3d at 1437. I can agree that a *fact-finder*'s determination that discrimination is no more likely to be the motive for the proffer of a pretext than many other explanations is an ample basis for according diminished weight to a pretext finding. But the majority's gloss on the "points nowhere" statement provides no basis for depreciating the pretext finding in this case. That is so because in this case, there was nothing in the record to support a finding that log-rolling, nepotism, spite, or any of the majority's other hypothesized explanations were the reason for Vassar's proffer of a pretextual explanation, and the fact-finder did *not* find that other explanations for the pretextual proffer were as likely as discrimination. Whether the majority's "equal probability" gloss and its unflattering speculation about how tenure decisions are made at Vassar strengthens the argument for ruling the discrimination finding clearly erroneous on appellate review is more properly considered in Part A(2), *infra*.

The majority's second reason for diminishing the significance of a pretext finding is the startling notion that an employer like Vassar might quite understandably proffer a false reason for adverse employment action simply because of a "lack of candor." ___ F.3d at ___.

Thus, a college, usually regarded as a bastion of uninhibited pursuit of truth, is excused from proffering its real reasons because the professors holding them lack "candor."

However, the whole point of the three-part analysis of *St. Mary's* and its predecessors (plaintiff's prima facie case, defendant's proffer, and plaintiff's ultimate burden to prove discrimination) is to afford the defendant an opportunity to proffer its real reason for the challenged action. A Title VII lawsuit is not some sort of face-saving exercise to enable bashful decision-makers to excuse their lack of candor. The defendant is called upon to proffer what it believes is the true reason for its action. It need not do so precipitously. It can make appropriate inquiry within its ranks. But once it proffers its reason in court, it subjects that reason to the assessment of the fact-finder, and if the fact-finder concludes, with support in the record, that the proffered reason is a pretext, the defendant is usually at risk of having the fact-finder draw the permissible inference that the pretextual reason was proffered to hide the true reason—discrimination.

Third, the majority depreciates the significance of a pretextual explanation by observing that the tenure decision challenged by Dr. Fisher was the combined result of many decision-makers. For several reasons, this circumstance is also not a proper basis for depreciating the force of a pretext finding.

To begin with, Vassar did not say, after full opportunity for internal inquiry, that different participants in the tenure process held views related to "log-rolling," "envy," "spite," or any of the other reasons suggested as possibilities by the majority. Vassar said Dr. Fisher was denied tenure because she lacked tenure qualifications, either on an absolute basis or at least on a comparative

basis, in view of the needs of the Biology Department. Having proffered its single explanation, Vassar cannot expect the probative force of a finding that this explanation is pretextual to be diminished just because Vassar could have proffered a variety of explanations that might have been held by its various decision-makers.

Moreover, whenever motivation is in issue, as it is in every discrimination case, identification of motive is more difficult where decisions are made by a group than by an individual. That fact, however, cannot provide insulation for group decision-making permeated by discrimination. Perhaps if only one out of 100 decision-makers participating in a collective process harbored an impermissible motive, the group decision would not be vulnerable. But if some significant portion of the decision-makers shared the improper motive (or perhaps just one of a very small number), the decision is tainted. The Supreme Court has recognized this principle in ruling that a state constitutional convention acted with an impermissible, racially-based motive in enacting a constitutional provision, even though the evidence identified only some convention delegates holding that motive. *See Hunter v. Underwood*, 471 U.S. 222, 228-30 (1985) (citing evidence canvassed by court of appeals in *Underwood v. Hunter*, 730 F.2d 614, 618-20 (11th Cir. 1984)); *cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (declining to declare act of Congress unconstitutional based on motives expressed by "a handful of Congressmen"). Whatever approach courts might take in ascertaining the motives of a group of convention delegates or legislators for purposes of constitutional adjudication, the group decision-making process of an employer, tested for purposes of determining a Title VII violation, may be found to be tainted by an impermis-

sible motive held by any significant participants in the process. The Supreme Court made this precise point in *Anderson v. City of Bessemer City*, 470 U.S. 564, 579-80 (1985), when it upheld the reasonableness of the District Court's finding of discrimination by citing the pretextual explanations of just two members of the five-member committee that had rejected the application of the Title VII plaintiff.

A further point about group decision-making concerns the venerable principle of *respondeat superior*. If an employer entrusts personnel decisions to persons who act on the basis of impermissible motives, the employer is responsible for the resulting act of discrimination. It may be true, as the majority says, that Vassar is not lying about the reason for denying tenure to Dr. Fisher just because one or more professors in the tenure process are lying, or as the majority prefers to say, "intentionally dissembl[ing]." Nevertheless, an employer can no more avoid legal responsibility for the unlawful discriminatory action of its subordinates than it can for their negligent infliction of harm in the course of their employment.

For all of these reasons, I fundamentally disagree with the majority's view that the pretext finding in this case, or in other tenure denial cases, is generally to be accorded slight evidentiary significance on the ultimate issue of discrimination, or, in the panel's even more extreme view, "points nowhere," *Fisher II*, 70 F.3d at 1437, at least in the absence of evidence that blunts the probative force of the pretext finding. In my view, the proper analysis as to the significance of a pretext finding should start, not with excuses for an employer's lack of candor nor with a claim that such a finding "points nowhere," but with an understanding of what a "pretext"

really is. A standard dictionary definition is "a purpose or motive alleged . . . in order to cloak the real intention." *Webster's Third New International Dictionary* 1797 (1993). Thus, a pretext is not merely a reason that relies on factual assertions that are not true; it is a reason that a person proffers *but does not believe* is the real reason for the action the person has taken. If a supervisor believes an employee has embezzled funds, a discharge based on that belief is not rendered pretextual simply because at trial the employee proves that he did not embezzle. The supervisor's proffered reason for the discharge is a pretext only if the supervisor says that embezzlement was the reason for the discharge and does not believe that this was the real reason. Of course, evidence that the employee did not embezzle is probative of the supervisor's true state of mind, and a trier persuaded that the employee did not embezzle might well doubt the claimed statement of belief.[7] But the issue remains—is it true that the supervisor *believed* that the employee embezzled? The reason stated ("proffered" in Title VII parlance) is pretextual only if the person does not believe what he or she is saying. What must be proffered is the alleged *reason* for the challenged action, *i.e.*, why the action was taken.

In ordinary discourse, if a person asserts that something is true and knows that it is not, that person would be described as lying (or, in the majority's felicitous phrase, "intentionally dissembl[ing]"), at least in the absence of joking, rhetorical debate, or mental disorder. But not every misstatement of fact, even a misstatement

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[7] As Judge Friendly observed, "One way of [establishing the pretextual nature of a proffered reason], of course, would be to show that the asserted neutral basis was so ridden with error that defendant could not honestly have relied upon it." *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980).

as to one's own belief, is necessarily a lie, in the sense of an indictable perjury. Though the distinction between a knowingly false statement of one's belief and a lie is not easy to describe, the majority in *St. Mary's* drew this very distinction. *See* 509 U.S. at 520-21. The distinction inheres in this significant sentence from Justice Scalia's opinion:

> The factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Id. at 511 (emphasis added). Since the falsity of the reason (*e.g.*, the employee did not embezzle or was never late) is not necessarily inconsistent with an employer's belief that the reason is true, in which case the employer's motive is not impermissible, Justice Scalia must have been using the phrase "disbelief of the reasons" to mean a fact-finder's "disbelief that the defendant really believed the reasons it was putting forward." That being so, Justice Scalia must have meant that mendacity is something *additional* to a defendant's putting forward a reason that it knows is not true.

Justice Scalia offers two explanations as to why a pretextual reason is not necessarily a lie, at least in the sense of a criminally actionable perjury. First, he points out, a dispute between two versions of an occurrence underlying the employer's proffered reason, even though resolved in a plaintiff's favor by a preponderance of the evidence, is not tantamount to proving guilt of perjury. *See id.* at 520. Second, he notes, a company might rely in good faith on a false statement of a front-line supervisor's professed belief in the reason given for some adverse employment action. *See id.* at 520-21. The

supervisor, Justice Scalia maintains, may be a liar, but the company is not (though under agency principles the company may be liable for the supervisor's lie). In any event, Justice Scalia does not doubt that a proffered explanation, found by a fact-finder not to be the reason believed by the defendant, is a pretext, and (whether perjurious or not) supports an inference, when coupled with the facts of a prima facie case, that the true reason was discrimination.

The reason for permitting an inference of discrimination from a finding of pretext is evident. In the context of Title VII lawsuits, the likely motivation for a defendant, called upon in court to proffer an explanation for its adverse employment action, to proffer a *pretextual* explanation is to hide the true explanation of discrimination. At least, this is generally so in the absence of some plausible explanation for the pretextual proffer. As we have previously observed, "Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct." *Binder*, 57 F.3d at 200. In *McDonnell Douglas*, 411 U.S. at 805, the Supreme Court called a pretextual proffer a "coverup" for discrimination. Of course, just as flight from the scene of a crime might be explained, there might be innocent explanations for proffering a reason not believed to be true, and *evidence* of such explanations will weigh against drawing the inference of discrimination.

Thus, the panel opinion is quite wrong to assert that the pretext finding made by the District Court in this case "points nowhere." On the contrary, it starts out pointing in the same direction that all pretext findings point—toward the finding of discrimination that is infer-

able from the facts constituting the plaintiff's prima facie case.[8] That proposition has been consistently recognized by the Supreme Court and by every appellate judge that has considered a Title VII case. Whether the pretext finding continues to point toward discrimination with sufficient probative force to persuade a fact-finder to infer discrimination depends on the evidence in the case, but there can be no doubt of at least the initial direction in which a pretext finding points. When the Supreme Court says in *St. Mary's*, as all other courts have also said, that a fact-finder may infer discrimination from a finding of pretext, it is obviously in no doubt as to the direction in which a pretext finding points. Moreover, the Supreme Court's assertion that an inference of discrimination may be drawn from a finding of pretext, without any additional evidence required from the plaintiff, necessarily means that the pretext finding generally points toward discrimination with considerable force, enough force to enable the plaintiff to win, except in those rare cases, considered below, where a finding of discrimination, following a finding of pretext, may fairly be viewed as clearly erroneous because of special circumstances existing in the record.

I have no doubt that in some cases, a fact-finder would be fully entitled to consider the probative force of a pretext finding to be substantially diminished or even eliminated. This could occur for any of three general reasons. First, the fact-finder might decline to draw the inference of discrimination from a finding of pretext because evidence in the record points persuasively to the existence of a third motive (neither the proffered explanation nor

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[8] This case is complicated by the circumstance that the plaintiff has alleged discrimination on two different grounds—status as a married woman and age. I consider the consequence of this circumstance in Part B, *infra*.

discrimination) as the true explanation for the defendant's adverse employment action. For example, the evidence might show that the employer gave a false explanation for discharging an employee (chronic lateness) in order to spare the employee the embarrassment of the true reason (stealing company funds). Many courts have recognized that the falsity of a defendant's proffered reason might not support an ultimate finding of discrimination in the face of substantial evidence blunting the normally probative force of the finding of pretext. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (in banc) (example of one of several proffered reasons shown to be questionable); *Binder*, 57 F.2d at 200 (example of pretextual reason explained by desire to protect business secret or reputation of employee); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-62 & n.3 (1st Cir. 1994) (example of pretextual reason for a discharge accomplished to prevent disclosure of employer's embezzlement); *see also Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442-43 (11th Cir. 1996) (example of employer proffering reason, lateness, that was falsely overstated). Obviously, if the evidence points toward a motive other than discrimination, a pretextual explanation offers slight, if any, basis for inferring discrimination.

Second, the evidence might persuade the fact-finder that some component of the plaintiff's prima facie case is not established. For example, the evidence might show that the plaintiff is in fact not a member of the protected class against which discrimination was alleged.

Third, the evidence might persuade the fact-finder that the defendant has such a strong tradition of *not* making discriminatory employment decisions as to make it unlikely that it acted on the basis of a discriminatory

motive in the plaintiff's case. For example, the evidence might show that an employer has hired and promoted an unusually large number of members of the group allegedly discriminated against and has also disciplined supervisors for isolated instances of discrimination. In such circumstances, even if a proffered explanation is found to be pretextual, a fact-finder would have a sound basis for declining to infer that the true explanation was discrimination.

These examples do not exhaust the possible circumstances in which the fact-finder could properly accord a pretext finding little, if any, significance. The important point, however, is that in all such circumstances, the diminished significance of a pretext finding arises from evidence in the record. Evidence, not speculation about possibilities, will normally be the soundest basis for diminishing or even eliminating the probative force of a finding of pretext.

Beyond relying on such evidence, a fact-finder is also entitled to decline to draw an inference of discrimination from a finding of pretext simply because of the fact-finder's own view of the unlikelihood that the pretextual explanation was proffered as a cover for discrimination. When trial judges regularly instruct juries to rely on their "common sense" or their "experience" in determining whether an inference, including an inference of motivation, ought to be drawn,[9] they are inviting these

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[9] A typical jury instruction includes the following language:

> The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw—but not required to draw—from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your *common sense*.
>
> So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven,

fact-finders to apply their own individual views about how likely it is that a person acted on the basis of an alleged motivation. Bench trial fact-finders, no less than jurors, are entitled to rely upon their common sense and experience in deciding whether to draw an inference, including the decision whether to infer discrimination from a finding of pretext.

Some might think that my view permitting the force of a pretext finding to be substantially diminished or even eliminated by the defendant's evidence of a "third motive" or any other circumstance that weakens the inference available from a pretext finding would be an instance of placing on an employer a burden to disprove discrimination. This is not so. To avoid entry of judgment as a matter of law, a defendant has no obligation to do anything other than proffer evidence of an explanation for its adverse employment action. However, if it proffers such evidence, it takes the risk that a fact-finder will find its explanation to be a pretext and the further risk that a fact-finder will infer discrimination from the facts of the prima facie case, strengthened by the permissible adverse inference from proffering a pretextual explanation. The employer is free to mitigate that risk by introducing evidence that explains why it proffered a pretextual explanation. It has no obligation or burden to do so, but, like all litigants facing the risk of liability based on permissible inferences from an adversary's evidence, it declines to present its own opposing evidence at its peril, even though the burden of persuasion on the ultimate issue remains on the plaintiff.

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such reasonable inferences as would be justified in light of your *experience*.

1 Sand et al., *Modern Federal Jury Instructions*, ¶6.01 (emphases added).

The point is best illustrated by the numerous cases permitting adverse inferences to be drawn against defendants even in criminal cases unless they provide an explanation that satisfies the jury. *See, e.g., Turner*, 396 U.S. at 405-18 (possession of heroin may authorize conviction for importing heroin unless defendant satisfactorily explains possession); *United States v. Gainey*, 380 U.S. 63 (1965) (presence at still being operated may authorize conviction for operating still unless presence satisfactorily explained by defendant). Though two members of the Court believed that permitting such an inference in the absence of a defendant's satisfactory explanation shifted the burden of proof to the defendant, *Turner*, 396 U.S. at 432-35 (Black, J., with whom Douglas, J., joins, dissenting; *see also Gainey*, 380 U.S. at 71 (Douglas, J., dissenting in part on self-incrimination grounds); *id.* at 74 (Black, J., dissenting on various grounds), the Supreme Court disagreed.

To say that a set of facts (subsidiary facts of the prima facie case plus a finding of pretext) permits an inference of discrimination unless the defendant presents evidence undermining the prima facie case or overwhelming it with contrary evidence does not assign to the defendant a burden of proof. The defendant has simply been afforded the opportunity of every defendant, confronted with a plaintiff's sufficient evidence, to present opposing evidence, without which it takes the risk that the trier might draw the inference of liability from the plaintiff's sufficient evidence. Neither the opportunity to present such evidence nor the risk that the inference might be drawn in its absence has ever been thought to place a burden of proof on the party opposing the inference.

For all of these reasons, I disagree profoundly with the majority's view that a finding of pretext in a discrimination case is often to be accorded little significance.[10]

(c) *The Combined Effect of a Prima Facie Case and a Finding of Pretext.* Having embraced a new and weak meaning of "prima facie case" and then depreciated the significance of a pretext finding simply because unproven possible explanations might exist, the majority then aggregates its views to assert that "the combined effect of both [a prima facie case and a finding of pretext] may have little capacity to prove what the plaintiff has the ultimate burden of proving." ___ F.3d at ___. This view is completely at odds with Justice Scalia's statement in *St. Mary's* that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required*." *St. Mary's*, 509 U.S. at 511 (internal quotation marks, footnote, and brackets omitted; emphasis in original).

Though I agree with the majority that "a finding of pretext, together with evidence comprising a prima facie case, is not *always* sufficient to sustain an ultimate finding of intentional discrimination," ___ F.3d at ___ (emphasis added), it will be a rare case where this is not so.

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[10] The majority makes an interesting comparison in suggesting that the "strength" of an employer's false statement, as probative of discrimination, will vary with the circumstances, like "a false exculpatory statement" as "an indicator of guilt." ___ F.3d at ___. The comparison demonstrates just how extraordinary it is for the in banc majority to indicate that a pretext finding may often have diminished probative force. One will search the Federal Reporter in vain for a decision in which a finding of guilt was held to be clearly erroneous because the strength of a false exculpatory statement was thought to be diminished by the "circumstances," even those shown by the record, much less the possible circumstances that an appellate court speculated might explain why a defendant might make a false exculpatory statement.

Surely the three cases[11] cited by the majority for the language just quoted are not examples of such insufficiency because in none of them was there any pretext finding at all, much less a pretext finding diminished by opposing evidence. As the Fifth Circuit has noted, "In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence." *Rhodes*, 75 F.3d at 994.

Whether this appeal presents one of those rare cases, explicitly contemplated by *St. Mary's*, 509 U.S. at 524, where a finding of discrimination may be deemed clearly erroneous despite a valid finding of pretext, requires consideration of how an appellate court reviews findings of fact, including a finding of discrimination.

2. Appellate Review of Findings of Fact

On the aspect of the appeal that concerns appellate review of a trial court's findings of fact, we again start in complete agreement. We all agree that any finding of fact by a district judge may be rejected on appeal if the finding is "clearly erroneous," *see* Fed. R. Civ. P. 52(a), a conclusion that may be reached when the appellate court is "left with the 'definite and firm conviction that a mistake has been committed.' "[12] *See Inwood Labora-*

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[11] *Hargett v. National Westminster Bank*, 78 F.3d 836 (2d Cir. 1996); *Sutera v. Schering Corp.*, 73 F.3d 13 (2d Cir. 1995); *Quarantino v. Tiffany & Co.*, 71 F.3d 58 (2d Cir. 1995).

[12] Review of a bench trial finding of fact to determine if it is "clearly erroneous" requires "deference" to a district judge, *Inwood Laboratories*, 456 U.S. at 855, but less deference than is accorded a jury's verdict. Because of Seventh Amendment considerations, a jury's fact-finding may not be rejected unless it can be said that no reasonable person could find as the jury did. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980). To reject as clearly erroneous a trial judge's

tories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Furthermore, we all agree that this basic principle of appellate review applies to findings of fact about a defendant's state of mind in discrimination cases. The Supreme Court settled that point fifteen years ago. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (intent to discriminate is issue of fact, subject to "clearly erroneous" standard of review). Finally, we all agree that clear error review is available for a finding of discrimination made after a finding of pretext. As the Supreme Court stated in *St. Mary's*, even after a finding of pretext, the plaintiff's claim of discrimination "remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted . . . under the 'clearly erroneous' standard of Federal Rule of Civil Procedure 52(a)." *St. Mary's*, 509 U.S. at 524 (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985)).

We divide, however, not on *whether* an appellate court may review a finding of discrimination to determine if it is clearly erroneous, but on *how* such review is to be made. An appellate court may not simply review a record and announce that it is left with a firm conviction that a mistake has been made. After a district judge has

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finding, an appellate court need not say that no reasonable judge could make such a finding. As the Supreme Court has observed, "the 'clearly erroneous' standard is significantly deferential . . . [a]nd application of a reasonableness standard is *even more deferential* . . . , requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find it to be true . . . ." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993) (emphasis added); *see Ferrero v. United States*, 603 F.2d 510, 512 (5th Cir. 1979) (noting distinction between review of jury verdict and trial judge's findings); *Continental Casualty Co. v. Stokes*, 249 F.2d 152, 154 (5th Cir. 1957) (same).

made an ultimate finding of fact and has supported that finding with a large number of subsidiary findings of fact, proper regard for the relationship between a court of appeals and a district court requires more than a bare assertion of disagreement. The reviewing court has an obligation either to analyze the evidence relied on to support the ultimate finding and explain why it is seriously deficient, or to analyze other evidence in the record and explain why it so substantially supports a finding contrary to the one reached by the district judge as to create a firm conviction that the judge's finding is wrong. *See Anderson*, 470 U.S. at 575. In rare cases, both tasks might lead to appellate rejection of a finding.

Appellate courts rejecting district court findings as clearly erroneous have regularly undertaken these tasks. *See, e.g., Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534-37 (1979) (approving Court of Appeals rejection of finding after identifying significant evidence overlooked by District Court); *Jiminez v. Mary Washington College*, 57 F.3d 369, 380-82 (4th Cir. 1995) (rejecting finding of discrimination after analyzing and deeming insubstantial evidence trial court relied on and also analyzing substantial contrary evidence); *Sumner v. United States Postal Service*, 899 F.2d 203, 209-11 (2d Cir. 1990) (analyzing evidence opposing District Court's rejected finding that employer's proffered reason for discharge was not pretext).

In this case, the panel decision that the in banc majority has permitted to go into effect did not perform either task. It did not even purport to deem deficient the evidence underlying either the plaintiff's prima facie case of discrimination against married women or the finding of pretext. Not one of the District Court's 111 subsidiary findings of fact was ruled unsupported by the evidence.

Nor did the panel attempt to marshall evidence in the record opposed to the ultimate finding of discrimination.

This does not mean that a fact-finder's inference of discrimination is immune from review for clear error. An appellate court may reject an inferential ultimate finding if the subsidiary facts are clearly erroneous, if there is a complete absence of subsidiary facts, *e.g.*, *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 109-10 (2d Cir. 1997) (inference of content of telephone conversation rejected for lack of factual predicate), or if the fact-finder articulated, or necessarily relied on, an aspect of its reasoning process that was not merely different from the views of the appellate court but was demonstrably unsound. But the rejection must be based on evidence in the record.

Our disagreement on the circumstances under which an inference of discrimination may be rejected is at the heart of the matter. The majority believes that an appellate court may reject a fact-finder's inference of discrimination, drawn from a finding of pretext, whenever the appellate court thinks (or in Rule 52(a) terms, "is firmly convinced") that reasons other than discrimination are as likely to explain a pretextual proffer as discrimination itself. No authority is cited for this proposition, not any Title VII case, not even any decision from any other field of substantive law. I fundamentally disagree with the majority's unprecedented grant to reviewing panels of a roving commission to second-guess district courts on the relative likelihood of possible explanations for a Title VII defendant's proffer of a pretextual reason. A reviewing court may legitimately reject an inference of discrimination, not because of its views about employer behavior in general or university behavior in particular, but only where a record

provides an articulable basis for exercising the narrowly circumscribed appellate function of determining that a finding of fact is clearly erroneous.

It is not difficult to imagine cases where, despite a sustainable finding of pretext, a record contains evidence that justifies an appellate court in ruling that an ultimate finding of discrimination is clearly erroneous. Just as the fact-finder is entitled to decline to draw an inference of discrimination from a finding of pretext, an appellate court is entitled to conclude *from evidence in the record* that the inference of discrimination is so demonstrably unsupportable as to be clearly erroneous. Such clear error could occur if the record overwhelmingly established any of the circumstances discussed above that would entitle a fact-finder not to infer discrimination from a pretextual proffer. These include facts that overwhelmingly establish a third motive for the pretextual proffer, undermine a component of the plaintiff's prima facie case, or demonstrate that the defendant is highly unlikely to have discriminated. But in the absence of such evidence, a reviewing court may not reject a finding of discrimination simply because the reviewing court does not believe that the inference of discrimination is warranted. That is the clear message of *Anderson*, where the Supreme Court reversed a court of appeals for disagreeing with a district court's inference of discrimination, which was based on pretextual explanations. "This standard [a definite and firm conviction that a mistake has been made] plainly does not entitle a reviewing court to reverse a finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

The point is well illustrated by the majority's comment on the significance of an inference of guilt arising

from flight from the scene of a burning building: "[F]light from the scene of a crime ordinarily has evidentiary weight, but flight from a scene of arson shows nothing if the defendant fled the scene of a department store inferno during business hours." ___ F.3d at ___. What diminishes the significance of flight in this example is evidence that establishes key facts: (a) the building is a department store, and (b) the suspect fled from it during business hours. That evidence, not an appellate court's generalized view of why people flee from crimes (or proffer pretextual explanations for tenure decisions) diminishes the significance of daytime flight from a burning department store, and even permits an appellate court to deem an inference of guilt from such flight clearly erroneous.

Having disclaimed any review of the adequacy of the District Court's finding of discrimination,[13] the majority

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[13] The closest the majority comes to explaining why the finding of discrimination is clearly erroneous (apart from depreciating the finding of pretext) is the following passage:

> A five-member committee of tenured professors in the Biology Department, three men and two women, were charged with reviewing Fisher's credentials in accordance with three criteria: scholarship, teaching ability, and service to Vassar. In a confidential report, the committee found Fisher deficient in all three categories, and unanimously recommended that she be denied tenure.

___ F.3d at ___.

If the majority means to say that there is so much evidence in the record that Dr. Fisher is not qualified for tenure as to overwhelm the inference that she was rejected because of discrimination, it is free to refer us to it. It is not surprising, however, that the majority opinion does not undertake this task, because the majority has accepted the finding that the proffered reason was pretextual, and that reason was that Dr. Fisher "did not meet the posted standards for tenure." Once the majority accepts as a pretext Vassar's claim that Dr. Fisher did not meet the tenure standards, it cannot rely on her alleged failure to meet those standards as the explanation for rejecting Judge Motley's finding of discrimination.

instead has elected to narrow the scope of the in banc appeal and authorize issuance of a mandate that relies on the rulings of the panel that initially heard this appeal. That procedural device requires consideration of the third matter presented by this case—an in banc court's relation to a panel opinion.

3. Relation of an In Banc Court to a Panel

The majority observes, and I fully agree, that an in banc court is not normally convened to reconsider a panel's assessment of a district court's factual findings. In this case, however, an in banc court was convened in an appeal that largely concerned the panel's rejection of the District Court's finding of discrimination. The rehearing order contained no limitation of issues. *See Fisher v. Vassar College*, No. 94-7737 (2d Cir. Feb. 16, 1996) (order for rehearing). Once an appeal is ordered for a plenary rehearing, the in banc court normally ought to make its independent assessment of the appeal.[14] Of course, an in banc court has the option of deciding only certain issues and then voting to dissolve itself and return any undecided issues to the panel for further consideration in light of the decision of the in banc court, *cf. Peck v. United States*, 102 F.3d 1319 (2d Cir. 1996) (in banc) (in banc court dissolves itself and returns appeal to panel for reconsideration in light of recent Supreme Court decision), but the in banc court has not done so in this case.

[14] The majority faults me for not citing authority for my view that the in banc court should not dissolve itself without considering the issue that prompted the in banc rehearing—whether the panel was entitled to depreciate the significance of a pretext finding by asserting that it "points nowhere." I can cite no authority opposing the majority's novel procedure for the simple reason that until today no in banc court had ever acted to dissolve itself in the absence of changed circumstances. If supporting authority is needed, it should be supplied by the side that is taking this wholly unprecedented step.

Instead, the majority pursues a most unusual course. Despite the grant of plenary in banc review, the majority first frames a limited issue for in banc decision, then states that the majority's "ruling" on the limited issue "reaffirms the applicability of the rule employed by the panel," ___ F.3d at ___, and finally orders issuance of a mandate that draws its authority both from the in banc opinion and the rulings of the panel as originally made, without any further consideration.

The majority's unprecedented approach is not even internally consistent. At the outset, the majority states, "A majority of the Court has decided to limit in banc review to resolution of the question whether a finding of liability under Title VII, supported by a prima facie case and a sustainable finding of pretext, is subject to review for clear error." ___ F.3d ___ (footnote omitted). Then, after framing this narrow (and indisputable) question, the majority moves on to consider several other matters. The majority states that a prima facie case of discrimination, considered apart from the persuasive force of opposing evidence, is not necessarily sufficient to take a case to a fact-finder. Then, acknowledging that the in banc rehearing is *not* limited to the question of whether clear error review is possible, as it first said, the majority states that the review is "limited to the force and effect of a pretext finding." *Id.* at ___. On this issue, the majority further states that a finding of pretext has little, if any, significance whenever an appellate court believes that there are possible explanations, even though not established in the evidence, that might explain why an employer proffered a false explanation for its action. Later, the majority, though disclaiming the promulgation of any "rule," *id.* at ___ ("The rule is that there is no rule peculiar to discrimination cases."), announces a novel method of analyzing an employer's false state-

ment, which looks very much like a "rule": "the weaker the evidence of discrimination, the less reason there is to believe that the employer's false statement concealed discrimination," *id.* at ___. Finally, the majority, though declining to consider the correctness of the panel's rejection of the District Court's finding of discrimination, undertakes to explain what the panel must have meant by its extraordinary statement that a finding of pretext "points nowhere." *Id.* at ___.

The majority's novel method of proceeding raises two serious issues of institutional concern: (a) what issues should this in banc court adjudicate, and (b) what procedure should be required of the panel after dissolution of the in banc court?

(a) *Issues for the in banc court.* The majority asserts that the in banc rehearing was ordered to resolve the issue of "whether a finding of liability under Title VII, supported by a prima facie case and a sustainable finding of pretext, is subject to review for clear error." ___ F.3d at ___. That is assuredly not why I voted for in banc review, since that issue had previously been decisively settled by *St. Mary's*. *See* 509 U.S. at 524. My vote to in banc, and, I believe, the votes of some other members of the Court, were cast to determine not *whether* clear error review was available, but *how* such review should be conducted. Many of us were deeply troubled by the panel's unprecedented ruling that a finding of pretext "points nowhere," *see Fisher II*, 70 F.3d at 1437, which was contrary to the ruling in *St. Mary's* that such a finding permits an ultimate finding of discrimination.

Even if many of those voting to in banc this appeal did so primarily, or even only, to confirm the proposition that clear error review is permissible, once the appeal is

reheard, we should discharge our responsibilities by facing up to major issues fairly presented by the case. Manifestly, a major issue arising from the panel opinion is what significance a reviewing court should give to a sustainable finding of pretext. Does it "point[ ] nowhere," as the panel stated? Does it point toward discrimination, but with only minimal probative force, as perhaps some believe? Or does it point toward discrimination with strong probative force, at least in the absence of evidence that blunts such probative force, as I believe? Rather than answer these questions, the majority expresses a few thoughts about a pretext finding and then declines to rule on whether or not the District Court's use of a pretext finding to support an inference of discrimination in this case is permissible. But whether such use is permissible is the crucial issue on this appeal. To decline to rule on it is a default of adjudication. The district judges of this Circuit gain little, if any, illumination from learning that a majority of this Court believes that lack of candor might explain why a Title VII defendant proffers a reason that is pretextual. What they need to know, especially after reading the panel opinion in this case, is whether this Circuit holds the view that a pretext finding points nowhere, and, if not, to have some guidance as to the appropriate role of such a finding in the resolution of a Title VII claim. This in banc rehearing was the occasion for providing that guidance. Regrettably, the opportunity has been missed.

Rather than provide such guidance, the in banc court has voted to dissolve itself without considering whether the pretext finding in this case, plus other findings of the District Court, support the ultimate finding of discrimination. Though the majority has the undoubted power to use its one-vote edge to accomplish this result, its action is an inappropriate use of the in banc procedure. A clear

majority of the active judges voted to accord this appeal a plenary rehearing. No changed circumstance has arisen since that decision to warrant a restriction of the scope of the in banc.[15] The majority has simply elected to use its voting power to remove from in banc consideration the resolution of the issue that occasioned the in banc order.[16] In the Supreme Court, a minority of four justices are permitted to bring a case to the Court for review, after which the majority adjudicates the issues presented.[17] *See* Leonard M. Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975 (1957). In this case, despite a *majority* vote of the active judges in favor of in banc review, a narrow majority of the in banc court has now voted to remove the basic issue on this appeal from consideration by the in banc court.

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15 Thus, this case is unlike prior instances in which an in banc court dissolved itself such as *Peck*, 102 F.3d at 1320, where the intervening decision of the Supreme Court made reconsideration by the panel appropriate, or *United States v. Muniz*, ___ F.3d ___, ___ (2d Cir. 1997) (on reconsideration), where the intervening discovery of a transcript revealed a procedural step that eliminated the issue for which the in banc had been ordered.

16 The exercise of such voting power is especially questionable in this case since the current narrow majority that is voting to limit the scope of the in banc rehearing so as to avoid reconsideration of the panel's decision is formed by the votes of those who unsuccessfully voted against a plenary in banc rehearing.

17 Whether a narrow one-vote majority of the Supreme Court should exercise its power to dismiss a writ of certiorari as improvidently granted has occasioned serious dispute within the Court. *Compare New York v. Uplinger*, 467 U.S. 246 (1984) (5-4 vote to dismiss writ of certiorari as improvidently granted); *id.* at 249 (Stevens, J., concurring) (justifying Court's 5-4 action), *with Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Opinion of Stewart, J., with whom White, J., joins) (opposing 5-4 dismissals); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 508 & n.7 (1971) (Douglas, J., dissenting) (same); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 528 (1957) (Frankfurter, J., dissenting) ("No Justice is likely to vote to dismiss a writ of certiorari as improvidently granted after argument has been heard, even though he is not convinced that the case is within the rules of the Court governing the

I do not contend that all members of an appellate court, and certainly not of an in banc court, are obliged to read every word of a record in order to cast a responsible vote on the issue of whether an ultimate finding of fact is clearly erroneous. Judges are entitled to rely on the materials culled from the record by knowledgeable appellate lawyers on opposing sides. They are also entitled to accept, without detailed independent verification, an analysis of the evidence set forth in majority and minority opinions. But to decline to use any of these traditional techniques and instead to remove the key issue of this appeal from in banc consideration in unfair both to the judges of this Court who wish to have that issue considered (whether or not their views on the merits ultimately prevail) and to the judges of the district courts

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granting of certiorari. In the usual instance, a doubting Justice respects the judgment of his brethren that the case does concern issues important enough for the Court's consideration and adjudication."); *United States v. Shannon*, 342 U.S. 288, 298 (1952) (Douglas, J., dissenting) ("If four can grant [a writ of certiorari] and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired.").

In *Uplinger*, Justice Stevens maintained that the intense scrutiny of a Supreme Court case after full briefing and argument, compared to the summary examination at the time a writ of certiorari is selected for a grant from among 100 petitions considered each week is itself an intervening circumstance that permits a 5-4 majority to dismiss a writ as improvidently granted. *Uplinger*, 467 U.S. at 250 (Stevens, J., concurring). He also relied on the Court's normal reluctance to decide constitutional issues prematurely. *Id.* at 251.

Whatever the appropriate course for the Supreme Court to follow, a court of appeals ought not to use a one-vote edge to remove significant issues from the purview of an in banc court that was convened for plenary review. Our Court is not burdened with a flood of certiorari petitions. A vote on whether to grant in banc review is a rare event in this Court, *see* Jon O. Newman, *In Banc Practice in the Second Circuit, 1989-93*, 60 Brooklyn L. Rev. 491, 501-02 (1994), and the grant in this case was made only after extended consideration.

who will now not receive the authoritative guidance for which this in banc rehearing was ordered.[18]

(b) *Procedure for the panel after in banc dissolution.* After limiting the scope of the in banc rehearing and dissolving the in banc court, the majority then takes the wholly unprecedented step of ordering a mandate to issue without the need for reconsideration by the panel in light of the in banc majority's opinion. This step is taken because of the in banc majority's assertion that its "ruling" on the now limited question of "the force and effect of a pretext finding . . . reaffirms the applicability of the rule employed by the panel." ___ F.3d at ___.

In fact, it is evident that, at least in two crucial respects, the panel did not proceed as the majority now indicates is required of a reviewing court diminishing the significance of a pretext finding. First, the in banc majority opinion says that a finding of pretext may be accorded little, if any, weight where circumstances make it clear that the probability that the pretext was proffered to hide discrimination is just as likely as several other explanations that the defendant might have had for such a proffer. But in this case, the fact-finder made no such finding of equal probabilities, and the panel that rejected Judge Motley's finding of discrimination made no determination that it thought that the probabilities were equal. Second, the in banc majority says that appellate rejection

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[18] The majority professes to be unable to think of any reasons that might warrant the in banc court's discharge of the responsibility it undertook when it granted plenary review. ___ F.3d at ___ n.12. I would have thought that concern for colleagues on this Court, who have spent considerable time considering the fact-based issues that prompted the call for a plenary in banc rehearing, as well as for district judges, who would be enlightened by seeing how the in banc court applies its newly announced "principles," might have occurred to the majority.

of a finding of discrimination must be based on the evidence in the record. But in this case the panel opinion did not point to evidence that undermined the plaintiff's prima facie case, supported a non-discriminatory reason for proffering a pretextual explanation, or showed that discrimination was not the reason for the tenure denial. Of course, it is possible that if this appeal is returned to the panel for reconsideration in light of the majority's in banc opinion, the panel would again conclude that the finding of discrimination was clearly erroneous. But adjudication of this appeal should not rest on the majority's prediction of what the panel will do.

The reality is that the issue framed by the majority—"the force and effect of a pretext finding"—is the type of issue that gains only slight illumination from abstract statements. Only the *exercise* of an appellate court's authority to review a discrimination finding for clear error will oblige that court to explain how such review is being conducted and why, in a particular case, a pretext finding lacks the "force and effect" that normally permits it to support a discrimination finding. Since the majority has said so little about how a discrimination finding is to be reviewed and how a finding of pretext may by diminished in significance, it is not surprising that it prefers not to demonstrate the shortcomings of its "ruling" by attempting to apply it to Judge Motley's findings of pretext and discrimination.

Since the majority authorizes issuance of a mandate that draws part of its authority from the panel opinion, I am obliged to turn my attention to the reasons given by the panel for rejecting the District Court's finding of discrimination.

4. The Panel Opinion's Rejection of the Finding of Discrimination[19]

The panel opinion starts with the District Court's finding of pretext and then abruptly eliminates it from the ensuing analysis by stating, "The finding of pretext affirmed in this opinion points nowhere . . . ." *Fisher II*, 70 F.3d at 1437. As discussed above, this total rejection of the significance of the pretext finding cannot be reconciled with the contrary view of the Supreme Court in *St. Mary's*.

What then was there about the pending case that led the panel to ascribe no weight to the finding of pretext and to rule that the finding of discrimination was clearly erroneous? The panel took two further steps after disregarding the finding of pretext. First, it said that the District Judge herself did not believe that the combination of a prima facie case plus a finding of pretext supported an ultimate finding of discrimination. *Id.* I see nothing in Judge Motley's opinion to support this statement, and, even if some basis for doubt on this score existed, the proper remedy would not be to reverse the District Judge by reading (or misreading) her mind, but to remand the case so that Judge Motley can tell us whether she finds that the prima facie case plus the finding of pretext suffices to persuade her, as the fact-finder, to make the ultimate finding of discrimination.

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[19] In a spirited concurring opinion, Judge Jacobs, the author of the panel opinion, undertakes to respond to the discussion in the following Part A(4), concerning the panel's rejection of the District Court's ultimate finding of discrimination based on marital status. Judge Jacobs's detailed examination of the evidence persuasively demonstrates why the findings he would have made had he been the trier of fact would not have been clearly erroneous. However, they also demonstrate, perhaps more effectively than anything in this dissenting opinion, that the panel rejected Judge Motley's ultimate finding of discrimination because it performed the role of super fact-finder, not the more limited reviewing role to which an appellate court is appropriately confined.

Lacking any words in Judge Motley's opinion to support the notion that she did not believe the pretext finding supported an inference of discrimination, the panel bases its view of Judge Motley's thinking on the fact that after finding both a prima facie case and pretext, she went on to identify three categories of evidence that lent additional support to her ultimate finding of discrimination. As the panel views it, Judge Motley "felt compelled to comb the record for evidence of discrimination, evidently convinced, as are we, that the finding of pretext here did not alone justify a finding of discrimination." *Id.* This is an unfair characterization of Judge Motley's opinion. The District Judge proceeded as bench trial judges frequently do: she made the two findings that the case law of the Supreme Court and this Circuit says are sufficient to support an inference of discrimination, she then drew the permissible inference from pretext and made the ultimate finding of discrimination, and then she went on to make additional findings to demonstrate added support for her ruling.

The panel's next step was to reject, not the basic findings of a prima facie case and pretext, but some of the *additional* findings that lend further support to the ultimate finding of discrimination. Judge Motley discussed three categories of evidence as additional support for her finding of discrimination—(a) discriminatory use of student evaluations, (b) statistical evidence, and (c) anecdotal evidence. *Fisher v. Vassar College*, 852 F. Supp. 1193, 1228-29 (S.D.N.Y. 1994) ("*Fisher I*"). The panel rejected the statistical evidence, *Fisher II*, 70 F.3d at 1442-47, and the anecdotal evidence, *id.* at 1438-40, and, for purposes of this discussion, I will assume, only for the sake of the argument, that the District Court's findings in these two categories were clearly erroneous. But the panel disregarded, without explanation, Judge

Motley's first category of additional evidence. This concerned student evaluations, which she found were "almost exclusively" the basis for assessment of Dr. Fisher's teaching performance. *Fisher I*, 852 F. Supp. at 1209 (finding 45).

Judge Motley found that Vassar students rated teachers for various characteristics on a scale of one to five, and that for male tenure candidates and non-married female tenure candidates Vassar considered the percentage of students who rated candidates in the *top two* categories but that for Dr. Fisher, the only married female considered for tenure, Vassar considered only the percentage of students rating her in the *one highest* category. As a result, Dr. Fisher had a lower percentage of favorable student evaluations than males and unmarried women, and this lower percentage was considered in the tenure evaluation.[20] *Id.* at 1209-10 (findings 47-49), 1228. This additional finding was not ruled clearly erroneous by the panel, and no explanation was given as to why it does not lend some weight to the finding of discrimination. Indeed, this subsidiary finding was *accepted* by the panel in its discussion of the evidentiary sufficiency of the finding of pretext, *Fisher II*, 70 F.3d at 1435-36, but omitted, without explanation, in the panel's rejection of the District Judge's finding of discrimination.[21]

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[20] When asked at oral argument on this appeal about this specific instance of bias in evaluating Dr. Fisher, compared to male and unmarried female tenure candidates, counsel for Vassar acknowledged its unfairness.

[21] It is remotely arguable that the significance of the findings concerning discriminatory use of student evaluations is slightly lessened by finding 55, in which Judge Motley pointed out that a comparison of Dr. Fisher's evaluations to the favorable evaluations accorded to Dr. Norrod, a single woman granted tenure, "does not give a true picture of the situation." *Fisher I*, 852 F. Supp. at 1210 (finding 55). As the Judge noted,

Though leaving undisturbed the findings about discriminatory use of student evaluations, the panel then proceeded to reject aspects of Judge Motley's findings that she had *not* included in the three categories of evidence that she elected to discuss as giving added weight to her finding of discrimination. These other aspects concern expert testimony, *id.* at 1447-48, and party admissions, *id.* at 1440-42. Again, for purposes of this discussion, I will assume that the panel was entitled to reject these other findings. Nevertheless, the basic issue remains: how can a panel reject a finding of discrimination that is based on the facts that establish a prima facie case, plus a finding of pretext, plus the undisturbed additional finding of discriminatory use of student evaluation ratings?

The panel's approach boils down to three steps: (a) the finding of pretext is disregarded, (b) the findings of discriminatory use of student evaluations are ignored, and (c) *other* findings are found to be clearly erroneous. This approach is inconsistent with every instance of appellate review of trial court fact-finding in discrimination cases. Even if *some* of the trial court's subsidiary findings are deemed clearly erroneous, the most an appellate court could properly do would be to remand to the District Court to reconsider its ultimate finding of discrimination on the basis of the subsidiary findings that are undisturbed—the facts of the prima facie case, the finding of pretext, and the findings of discriminatory use of student ratings. Since Judge Motley's opinion leaves me in no doubt that, even if limited to these undisturbed matters,

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Dr. Norrod carried a significantly lighter teaching load than did Dr. Fisher. It is difficult to see how this observation lessens the probative force of the unfair evaluation method that was applied only to the one married woman considered for tenure. The blunt fact remains that a more rigorous evaluation method was applied to Dr. Fisher than to men or single women.

she would infer discrimination against married women, I would affirm this aspect of the judgment she entered.

Moreover, there is an additional basis in the evidence and the findings that supports Judge Motley's ultimate finding of discrimination against married women. Judge Motley found evidence of bias against married women reflected in the adverse comments in the tenure review file concerning Dr. Fisher's eight-year hiatus from teaching in order to raise a family. *Fisher I*, 852 F. Supp. at 1216 (findings 84-87). This hiatus occurred from 1966 to 1973, after which Dr. Fisher resumed teaching, first at Marist College for three years and then at Vassar. Though fully aware that Dr. Fisher had been away from teaching for an eight-year period that ended three years before she applied to Vassar, Vassar hired her and placed her on a tenure track. As Judge Motley noted:

> The persistent fixation of the Biology Department's senior faculty on a married woman's pre-Vassar family choices reflects the acceptance of a stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist and, therefore, is not one despite much evidence to the contrary.

Id. (finding 87).

Though the panel opinion discussed the evidence that Judge Motley relied on to support her findings regarding Dr. Fisher's hiatus from teaching and acknowledged that "[t]he evidence supports an inference that Fisher's eight-year absence from academia hurt her chance for tenure," 70 F.3d at 1448, it concluded that the District Court's inferences about discrimination from such evidence were not supportable. The panel expressed the view that the adverse comments about her hiatus were not "sex spe-

cific" and were legally insufficient to lend support to a Title VII claim. *Fisher II*, 70 F.3d at 1448. The panel agreed with Vassar's contention that the hiatus would be relevant to her claim only if the tenure experiences of women who took extended leaves of absence compared unfavorably with the tenure experiences of men who took such absences. *Id.*

I strongly disagree with this assessment of evidence that Judge Motley properly deemed significant. The panel's approach means that working women, penalized for taking years off to raise children, can be disadvantaged in the workplace for so long as it takes our society to become accustomed to the idea that working men share a responsibility to devote their time to raising children. Of course, Vassar was careful to say that the relevant comparison, necessary to make the adverse comments probative, should be between men and women who took extended absences from work *regardless of the reason*. Such a felicitous generalization cannot mask the obvious truth that the predominant reason that working women take absences from work is to bear and raise children; there is no pervasively comparable reason for absences among working men, and it is fatuous for the college to suggest that Dr. Fisher is to be faulted for not producing evidence of the tenure experiences of men who took absences "regardless of the reason." With rare exception, men do not take extended absences from work to raise children (or for any other reason); their reluctance to share in child-raising responsibilities cannot fairly be turned against Dr. Fisher to penalize her for not assembling data concerning such non-existent male absences. Judge Motley was entirely correct: the Biology Department's "persistent fixation on [Dr. Fisher's] pre-Vassar family choices reflects the acceptance of a stereotype and bias."

Of course, a college, or any other employer, is entitled to give an unfavorable rating to a person whose absence from a field, for whatever reason, has left that person deficient in necessary knowledge of current learning and developments. But there was not even a claim, much less evidence, that Dr. Fisher's child-raising hiatus had left her in any respect deficient in contemporary knowledge of her field. On the contrary, the record is replete with evidence of her numerous peer-reviewed publications, grant awards, papers presented, and consultantships to such institutions as the National Institutes of Health and the National Science Foundation. *Fisher I*, 852 F. Supp. at 1198-1205 (findings 9-31). Judge Motley was entirely justified in considering the adverse view of Dr. Fisher's hiatus to be further evidence of bias against married women.[22]

B. The Claim of Discrimination Based on Age

The District Court also found that Vassar had denied Dr. Fisher tenure on the basis of age. *Fisher I*, 852 F. Supp. at 1230-31. This second ultimate finding was based primarily on (a) a prima facie case of age dis-

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[22] Judge Motley also found that in at least the 30 years from 1956 to 1986, Vassar had not granted tenure to any married woman in the six "hard" sciences of biology, chemistry, geology, mathematics, physics, and computer science. *Fisher I*, 852 F. Supp. at 1218 (finding 97). The panel disregarded the significance of this finding on three grounds. The panel noted, first, that Vassar regarded psychology as one of the "hard" sciences; second, that two married women in the psychology department were granted tenure *after* Dr. Fisher's tenure denial; and, third, that two married women were granted tenure in other "hard" sciences departments, also after Dr. Fisher was denied tenure. *Fisher II*, 70 F.3d at 1446. Whether or not psychology is properly regarded as a "hard" science, the absence of tenure awards to married women in Dr. Fisher's department and in several other "hard" sciences departments in not totally lacking in probative value. Since the evidence and findings discussed in the text abundantly support Judge Motley's ultimate finding, this subsidiary point need not be pursued.

crimination and (b) a finding that Vassar's proffered reason for denying tenure—failure to meet tenure standards—was pretextual.[23] *Id.* Significantly, the District Court found that a component of the prima facie case of age discrimination—discharge under circumstances giving rise to an inference of age discrimination—was established by evidence showing that, with one distinguishable exception, *see id.* at 1230 n.24, "all other tenured faculty who were equally or less qualified than Dr. Fisher were at least nine years younger than Dr. Fisher when they were tenured." *Id.* at 1230; *see id.* at 1219 (finding 106). Moreover, had Dr. Fisher not taken eight years off from teaching to raise her children, before joining the Vassar faculty, she would have been within the age group from which Vassar is apparently willing to select tenured professors.

The claim of discrimination on two distinct grounds, inferable from a finding of pretext, introduces an added complexity to this case. Though the analogy is not exact, the situation is somewhat comparable to that presented by a person who is apprehended while fleeing from the scene of two crimes. The fact-finder may draw from flight an inference of consciousness of guilt with respect to one of the crimes, the other crime, or both crimes. However, it is also true that, in some circumstances, the strength of the inference from flight that tends to prove guilt of one offense makes it most unlikely that an inference of guilt as to the other crime is reasonable.

For example, if a person is apprehended fleeing from a scene where two victims have been robbed moments before, it is entirely reasonable to infer consciousness of

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[23] Judge Motley considered and rejected the probative force of two items of evidence claimed by the plaintiff to be direct proof of age discrimination. *Fisher I*, 852 F. Supp. at 1231 n.25.

guilt of both crimes, at least in the absence of circumstances significantly distinguishing the offenses. On the other hand, if the person fled from a scene where a bank was robbed and a work of art was elaborately defaced, and if circumstances strengthened the inference of the person's guilt of the bank robbery, the very act of fleeing from the bank robbery would make it highly unlikely that the fleeing person paused to commit an act of vandalism. In such circumstances, the trier would be fully justified in drawing an inference of guilt only as to the robbery, and, depending on the facts, an additional inference as to the vandalism, if drawn by the fact-finder, might well be clearly erroneous.

In the pending case, where the plaintiff presented a prima facie case of discrimination because she was a married woman and because of age, it was within the prerogative of the fact-finder to draw from the finding of pretext an inference of discrimination on both grounds. Unlike the bank robbery/vandalism example discussed above, discrimination based on marital status is not realistically incompatible with additional discrimination based on age. An employer could rationally decide to deny tenure to married women and to those over 40, and would therefore likely deny tenure to a married woman over 40. Thus, this is not a case where the very existence of one discriminatory motive is itself strong evidence that another alleged discriminatory motive is unlikely to have existed. Though the evidence more strongly supported the ultimate conclusion of discrimination against married women, it also permitted the inference of discrimination on the basis of age.

Concluding Thoughts

The majority has permitted the rejection, as clearly erroneous, of findings of discrimination that are entirely permissible in view of the fact that the finding of pretext is undisturbed by the Court, unexplained by the defendant, and uncontroverted by evidence in the record. That rejection is unwarranted, and the majority offers no satisfactory explanation for what it has done. In the absence of such explanation, one can only speculate about what underlies the majority's decision. The most likely explanation is that the majority is reluctant to have a court confer tenure on a professor who has been rejected for tenure by her faculty colleagues, her dean, her college president, and her board of trustees.[24] I share that reluctance, and had I been the trier of fact, I might have declined to find pretextual the proffered explanation of noncompliance with tenure standards, or to draw the inference of discrimination, even after a finding of pretext. But, as we have been authoritatively instructed, "the court of appeals may not reverse [a finding] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 574.

Though it is also possible that the majority prefers to fashion a less deferential approach to appellate review of a discrimination finding because the adverse employment decision has been made by a highly respected college, or because the particular action taken is the denial of tenure, we have no authority to apply special rules of

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[24] In fact, the District Court's judgment did not order Vassar to give Dr. Fisher unqualified tenure. It ordered reinstatement with tenure, subject to an evaluation by the college after two years for "retention" and promotion to the rank of full professor. *Fisher I*, 852 F. Supp. at 1235.

appellate review for such reasons.[25] *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 190 (1990) ("The effect of the elimination of this exemption [for educational institutions] was to expose *tenure determinations* to the same enforcement procedures applicable to other employment decisions.") (emphasis added); *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984) ("Tenure decisions are not exempt under Title VII . . . ."); *Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978) ("[A]cademic freedom [does not] embrace[ ] the freedom to discriminate.").

In the end, I am left with no adequate basis to reject the findings of married-woman and age discrimination made by the conscientious District Judge after a meticulous analysis of an extensive record. Even if, as I suspect, the majority's willingness to tolerate the rejection of these findings is an aberrational instance of excessive appellate review, prompted by reluctance to upset a college's denial of tenure, I cannot agree that such a rejection comports with applicable principles of law, and I therefore respectfully dissent.

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[25] We have observed that tenure at an institution of higher education compared to continued employment has a significance that makes appropriate a higher standard of qualification. "[A]dvancement to tenure entails what is close to a life-long commitment by a university, and therefore requires much more than the showing of performance 'of sufficient quality to merit continued employment' . . . ." *Lieberman v. Gant*, 630 F.2d 60, 64 (2d Cir. 1980) (citing *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977)) (footnote omitted). Since the majority accepts the District Court's finding that the proffered explanation—Dr. Fisher "did not meet the posted standards for tenure"—was pretextual, there can be no claim in this case that Dr. Fisher is not qualified for tenure.

WINTER, *Circuit Judge*, with whom Chief Judge Newman, Judges Kearse and Cabranes concur, dissenting:

Although I concur in Chief Judge Newman's dissenting opinion, I write separately because I hold views that are not fully reflected in that opinion.

The in banc court is unanimous in agreeing that Fisher established "a prima facie case," in some sense of the term. The in banc court is also unanimous in affirming as not clearly erroneous Judge Motley's finding that Vassar's proffer of an explanation was not the "real reason" but "a pretext" for denying Fisher tenure. Agreement ceases at this point. The majority takes the view that a Title VII/ADEA plaintiff who has: (1) established a prima facie case, (2) shifted the burden of production to the employer, (3) demonstrated an unrehabilitated pretextual explanation by that employer, and (4) obtained a finding from the trier of fact that the employer acted out of an unlawfully discriminatory motive, may still lose on the ground that the evidence of discrimination was legally insufficient.

Much of my disagreement with my colleagues in the majority stems from their narrow focus on selective quotations from Supreme Court Title VII cases. I do not deny that they find legitimate comfort in those quotations. However, the very same cases contain other language that is equally or more supportive of the opposite conclusion. It is hardly necessary, or even appropriate, however, to rely exclusively upon cut-and-paste analysis of Title VII decisions to address the legal issues that divide us. Those issues are not peculiar to discrimination law; rather, they involve the law of evidence and arise in every area of substantive law. Concepts such as prima facie case, presumptions, burden of production, and pretext have been the subject of a vast number of judicial

decisions and academic discussions. My colleagues in the majority avoid a discussion of the implications from other areas of the law for the use of these concepts in Title VII/ADEA cases simply by declaring that these concepts are "quite different" in discrimination law. Finding little in Supreme Court decisions that supports that conclusion, I believe that the use of these concepts in the other areas of the law must be addressed.

1. *Prima Facie Case and Its Consequences*

"Prima facie case" has two meanings, one stronger than the other: (i) the plaintiff has produced evidence sufficient to establish a disputed fact from which, if credited by the trier, arises a rebuttable presumption—the strong version; or (ii) the plaintiff has produced evidence sufficient to permit, but not compel, a trier of fact to find a disputed fact for the plaintiff (or party bearing the burden of persuasion on the disputed fact)—the weak version. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n. 7 (1981); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence*, § 3.4, at 137-38 (1995).

Meaning (ii) is subsumed within (i). As the Supreme Court said in *Burdine*:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

450 U.S. at 253.

Proof of "circumstances which give rise to an inference of unlawful discrimination" is surely sufficient to get to a jury. Moreover, footnote 6 to the quoted passage makes it clear that the four factor test as illustrated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)—the *Burdine* plaintiff was (1) a female (2) qualified for the job in question but (3) rejected (4) in favor of a male—is alone proof of "circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253 n.6. At the very least, therefore, "prima facie case" means that a party bearing the burden of persuasion has proffered legally sufficient evidence to permit a trier to find the disputed fact—here, unlawful discrimination. Mueller & Kirkpatrick, *supra*, §§ 3.2, 3.4.

Under *McDonnell Douglas*, a prima facie case is initially of the stronger (i) variety. *Burdine*, 450 U.S. at 254 n.7. If the employer remains silent and the trier finds the facts that trigger the *McDonnell Douglas* presumption, the employer loses. *Id.* at 254. The employer thus bears the burden of production regarding the reasons for an adverse employment decision. *Id.* If the employer proffers evidence of lawful reasons, we move to the next step of the analysis.

Title VII and the ADEA do not require an employer to proffer a reason for an adverse employment decision with which the trier of fact agrees. An employer is free to make mistakes. For example, a faculty may regard a tenure candidate's scholarship to be inadequate while the trier of fact believes that her writing is a major scholarly contribution. So long as the faculty truly, even if mistakenly, holds that negative view, there is no Title VII violation.

Once the employer proffers a lawful reason for the employment decision, then the "presumption [of unlawful discrimination] . . . drops out." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) (citing *Burdine*, 450 U.S. at 255). The majority opinion holds that when the "presumption . . . drops out," proof of the *McDonnell Douglas* four factors without more no longer constitutes a prima facie case of discrimination. The basis offered by my colleagues for this conclusion, apart from the "drops out" language itself, is the fact that the burden of persuasion remains with the Title VII/ADEA plaintiff after the employer has met its burden of production.

The issue is hardly disposed of so easily. The role of rebuttable presumptions involves a debate that has spawned a vast body of commentary and resulted in competing schools of thought traced to such venerable scholars as James Bradley Thayer and Edmund Morgan. *See, e.g.*, Edmund M. Morgan, *Basic Problems of Evidence* 28-45 (1962); James B. Thayer, *Preliminary Treatise on Evidence* 346 (1898); Edmund M. Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933); *see generally* Charles McCormick et al., *McCormick on Evidence* § 344 (4th ed. 1992); 1 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 300[01] (1996). Variations abound within each school of thought, *see, e.g.*, Mueller & Kirkpatrick, *supra*, § 3.8, at 148-50; McCormick et al., *supra*, § 344; Weinstein et al., *supra*, ¶ 300[01], at 300-3 to 300-4, and there is no one solution of commanding persuasiveness, much less one to be found in Supreme Court Title VII decisions that contain language useful to all the antagonists.

In my view, the "drops out" language indicates only that the *McDonnell Douglas* rebuttable presumption, version (i), loses all evidentiary weight, leaving a prima facie case in the sense of version (ii). I reach this conclusion for the following reasons. "Prima facie case" and "presumption" are not synonymous, as *Burdine* footnote 7 indicates. 450 U.S. at 254 n.7. The term prima facie case, even when used in sense (ii), means that a party having the burden of persuasion regarding a disputed fact has presented legally sufficient evidence to allow the trier of fact to find that fact. *Id.*

Presumptions, on the other hand, are legal rules calling upon the trier to add weight to one party's evidentiary scale if the evidence of the basic facts triggering the presumption is sufficient to allow the trier to find those facts. *See, e.g.*, Mueller & Kirkpatrick, *supra*, § 3.4; 1 Weinstein et al., *supra*, ¶300[01]. Most presumptions, however, are rebuttable, and there is no general agreement among commentators or courts at large what, if any, residual effect a rebutted presumption has. To say that a "presumption . . . drops out," therefore, does not inexorably mean that there is no longer legally sufficient evidence—i.e., a prima facie case—to allow a trier to find the disputed fact; it may mean only that the trier now resolves the issue based on its view of the evidence as a whole without giving the facts constituting the prima facie case the added evidentiary weight that they formerly had.

The majority give two principal reasons why it believes that a Title VII/ADEA plaintiff's prima facie case disappears once the employer proffers evidence of any explanation for the adverse employment decision.

The first reason given is the familiar rule that the burden of persuasion remains with the Title VII/ADEA

plaintiff even after the employer meets its burden of production. However, it is a non-sequitur to reason that, because the plaintiff bears the burden of persuasion once the defendant's production is satisfied, a bare *McDonnell Douglas* case is no longer legally sufficient; there is no inconsistency between the proposition that a plaintiff's prima facie case survives a defendant's satisfaction of a production burden and the proposition that the plaintiff still bears the burden of proof. Indeed, one must wonder why a federal court would puzzle over this issue because that is exactly what Fed. R. Evid. 301 provides.

Rule 301 was adopted by the Congress after it rejected a version proposed by the Advisory Committee and submitted to Congress by the Supreme Court. The Committee's version would have shifted the burden of persuasion to the adversary upon a party's establishing the basic facts that trigger a presumption. As adopted,[1] Rule 301 shifts only the burden of production of evidence to rebut or meet the presumption, leaving the burden of persuasion on the party asserting the presumption. However, in adopting that Rule, the Conference Report expressly noted that, even after the adverse party has carried the burden of production, "the jury . . . may [still] infer the existence of the presumed fact [unlawful discrimination] from proof of the basic facts [the *McDonnell Douglas* prima facie case]." H.R. Conf. Rep. No. 93-1597, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099; *see also* Mueller & Kirk-

[1] Rule 301 reads:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

patrick, *supra*, § 3.8; 1 Stephen A. Saltzburg & Michael M. Martin, *Federal Rules of Evidence Manual* 99-100 (5th ed. 1990); Weinstein et al., *supra*, ¶ 301[02]; 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5126, at 606 (1977) & 1996 Supp. at 324.[2]

In short, under Rule 301, once the adversary satisfies the burden of production and the presumption "drops out," the prima facie case drops from version (i) to version (ii). Therefore, unless the Title VII/ADEA defendant's evidence of a lawful explanation is so powerful that the plaintiff's evidence is no longer sufficient to create a genuine dispute of fact, *see Burdine*, 450 U.S. at 255, the *McDonnell Douglas* prima facie case is sufficient to support (not compel) a finding of discrimination.[3]

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[2] Chief Judge Newman and Judge Calabresi engage in a spirited debate concerning *Mobile, J. & K.C.R.C. v. Turnipseed*, 219 U.S. 35 (1910), and *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929).

In that regard, I would note that confidence in the continuing vitality of *Turnipseed* and *Henderson* is not widely shared. The original Advisory Committee that drafted the Federal Rules of Evidence found no existing barrier to its proposal (rejected by Congress) of giving all presumptions the burden-shifting effect that the Court invalidated in *Henderson*. Fed. R. Evid. 301, Advisory Committee Notes to 1972 Proposed Rules. The *McCormick* text concludes that *Henderson* is of "questionable status," McCormick et al., *supra*, § 345 at 590; *Lilly* regards *Turnipseed* and *Henderson* as giving "no definitive answer" to an issue that presently "is usually a distant concern," Graham C. Lilly, *An Introduction to the Law of Evidence* 72, n.3 (3d ed. 1996); and *Mueller and Kirkpatrick* show their view of *Henderson*'s current irrelevance by not mentioning it in their discussion of presumptions, Mueller & Kirkpatrick, *supra*, § 3.8.

[3] I do not, therefore, take the position attributed to me by the opinion of the court that a plaintiff's establishing a *McDonnell Douglas* prima facie case by the close of her evidence assures that the evidence of discrimination will be legally sufficient when all the evidence is in. And, of course, nothing in this opinion states that an employer may be liable for discrimination "where none was present and none was shown."

The second principal reason given by my colleagues in the majority for the extinction of the plaintiff's prima facie case once a Title VII/ADEA defendant proffers an explanation for an adverse employment decision is that the term prima facie case has a "quite different" meaning in Title VII/ADEA cases. In their view, version (ii) of a prima facie case is not subsumed within version (i) when the *McDonnell Douglas* prima facie case is proven by the plaintiff. Version (ii) instead allows the plaintiff to complete the plaintiff's main case without legally sufficient evidence of either discrimination or causation, necessary elements they regard as absent from the *McDonnell Douglas* factors.

This admittedly "quite different" meaning of prima facie case is said to be designed to prevent the employer from remaining mute about its motives for an adverse employment decision and moving for summary judgment or a directed verdict when the plaintiff is unable to provide evidence of an unlawful motive. This purpose may be the source of the Title VII/ADEA prima facie case/pretext construct that has created so much confusion.

If the Supreme Court were to undertake a reexamination of this area, it might well consider whether its prior decisions with respect to the alteration of burdens were necessary, much less worth the enormous confusion they have caused. The Federal Rules of Civil Procedure entitle a plaintiff to take discovery of the defendant. The plaintiff is entitled to demand that the defendant furnish the reason for the adverse employment decision that is the subject of the suit. A defendant who refuses to answer such a discovery demand would be subject to sanctions forbidding it from contesting allegations of discriminatory motive and causation. *See* Fed. R. Civ. P.

37(b)(2). In reality, therefore, there is no such thing as a silent defendant, or if there is, it is a losing defendant. I therefore question whether the framework created by *McDonnell Douglas* and *Burdine* has furnished anything of value to weigh against the enormous confusion it has caused. The Supreme Court might do well to consider abandoning the entire experiment and rule explicitly that the burdens in a discrimination case are no different from those in other cases.[4]

In any event, even if the risk of a silent defendant calls for a burden of production, it does not follow that prima facie has a "quite different" meaning in Title VII/ADEA. As noted, Fed. R. Evid. 301 provides that all presumptions shift the burden of production but not the burden of proof and, as the Conference Report explicitly states, once the burden of production is met, the jury may be instructed that it "may infer the existence of the presumed fact from proof of the basic facts."

I then come to the crux—to the question of whether evidence satisfying the four factor test as illustrated in *McDonnell Douglas* is legally sufficient to allow a trier to find discrimination. The opinion of the court states with admirable candor that it does not. Judge Calabresi's concurring opinion agrees. Both opinions are based on the view of those judges that more is needed to support an inference of discrimination and causation than is required by *McDonnell Douglas*. I think that this conclusion is foreclosed by Supreme Court decisions.

The fact that the Court has consistently used the term prima facie case in Title VII cases surely cuts strongly against the majority's conclusion. The opinion for the court concedes that the term usually refers to evidence

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[4] I am authorized to state that Judge Leval concurs in this paragraph.

legally sufficient to support a particular finding. If the Supreme Court is in fact using the term in a "quite different" way, some express recognition of the linguistic departure would be expected, but none has come forth. The majority's view is impliedly that the Court seems to have misspoken, and on repetitive occasions.

Courts do misspeak, and the chance that it has happened here can't be dismissed. However, the Supreme Court has done more than simply use the term "prima facie." As noted, in *Burdine*, the Court not only used the term prima facie case but also equated it with evidence of "circumstances giving rise to an inference of discrimination," adding a footnote flatly stating that the four factor test as illustrated in *McDonnell Douglas* was sufficient to support just such an inference. *Burdine*, 450 U.S. at 253, n.6. Indeed, the footnote held that because the plaintiff in *Burdine* had met the *McDonnell Douglas* test, she had produced enough evidence to support an inference of discrimination. Similarly, in *Int'l Bhd. of Teamsters*, 431 U.S. 324 (1977) the Court specifically described a *McDonnell Douglas* prima facie case as "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion." 431 U.S. at 358. This statement, which unqualifiedly asserts that a *McDonnell Douglas* prima facie case is sufficient to support an inference of discrimination and causation, was quoted with emphasis in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996). I do not believe that a Court of Appeals should, or even can, hold that the four factor test illustrated in *McDonnell Douglas* is not by itself sufficient to support an inference of discrimination and causation in light of the statements to the contrary in *O'Connor*, *Burdine*, and *Teamsters*.

2. *A Prima Facie Case and the Proffer of a Pretext*

My colleagues in the majority also hold the following: (1) a Title VII/ADEA plaintiff's presentation of a *McDonnell Douglas* prima facie case will, if the defendant stands mute as to the reasons for the adverse employment decision, result in liability; but, (2) the very same plaintiff's case can, if the defendant responds with a lie, be dismissed on insufficiency grounds. I take it that the majority would now disapprove the standard charge found in model jury instructions, 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 104.04 (1987); 5 Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶ 87.01 (Instruction 87-27) (1996), that the jury may (not must) infer a discriminatory motive from the consciousness of guilt reflected by dishonest statements about an adverse employment decision.

This view leads to peculiar results. For example, under the majority's reasoning, a prima facie case plus the proffer of a pretextual defense is weaker (from the plaintiff's standpoint) than an unanswered prima facie case. Moreover, it leaves Title VII/ADEA plaintiffs worse off than if *McDonnell Douglas* had provided for a version (ii) prima facie case than, as it did, for a version (i).

This puzzling ruling is also at odds with a vast body of law allowing inferences of consciousness of guilt to be drawn from dishonest behavior concerning facts material to litigation. For example, it is—or was until now—settled law that a false exculpatory statement by a defendant may (not must) support an inference of consciousness of guilt. *See United States v. Sureff*, 15 F.3d 225, 227 (2d Cir. 1994); *United States v. Gaviria*, 740 F.2d 174, 184 (2d Cir. 1984); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974); *United States v. Lacey*,

459 F.2d 86, 89 (2d Cir. 1972); 1 Devitt et al., *supra*, § 14.06; 1 Sand et al., *supra*, ¶ 6.05 (Instruction 6-11). *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995), did no more than apply this universally recognized principle to false exculpatory statements by employers. My colleagues hold that this principle does not apply to employers or, perhaps, that it no longer applies to any party to litigation, including criminal defendants.

For another example, one of the most routine of jury instructions—perhaps given hundreds of times by some of my colleagues in the majority who are former district judges—states that if a jury finds that a witness has lied in a material part of his or her testimony, the jury may (not must) disbelieve other material parts of that witness's testimony. 1 Devitt et al., *supra*, § 15.06; 1 Sand et al., *supra*, ¶ 7.01 (Instruction 7-19). Do such false statements now "point[ ] nowhere?" *Fisher v. Vassar College*, 70 F.3d 1420, 1437 (2d Cir. 1996).

Similar instructions have been routinely given with regard to flight from the scene of a crime, 1 Devitt, et al., *supra*, § 14.08; 1 Sand et al., *supra*, ¶ 6.05 (Instruction 6-9), use of a false name, 1 Sand et al., *supra*, ¶ 6.05 (Instruction 6-10), fabrication of an alibi, *id.* (Instruction 6-12), use of disguised handwriting, *id.* (Instruction 6-13), falsification of evidence, 1 Devitt et al., *supra*, § 14.07; 1 Sand et al., *supra*, ¶ 6.05 (Instruction 6-14), intimidation of witnesses, 1 Devitt et al., *supra*, § 14.07; 1 Sand et al., *supra*, ¶ 6.05 (Instruction 6-16), and engaging in clandestine behavior, 1 Sand et al., *supra*, ¶ 6.06 (Instruction 6-19).

Finally, in a criminal case, a defendant who takes the stand to deny the crime waives a sufficiency challenge to the prosecution's main case considered alone. *United*

States v. Kahn, 53 F.3d 507, 515 (2d Cir. 1995); *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993); *United States v. Roldan-Zapata*, 916 F.2d 795, 803 (2d Cir. 1990), *cert. denied*, 499 U.S. 940 (1991). Nevertheless, my colleagues in the majority hold that under Title VII/ADEA, an employer who proffers a lie about an adverse employment decision, can, precisely as a result of the act of lying, renew a previously rejected sufficiency challenge to a plaintiff's main case. Given that the prosecution's burden of proof in a criminal case is heavier than that of the Title VII/ADEA plaintiff, this vastly different treatment of pretextual defenses seems inexplicable unless my colleagues are prepared to change the rule now prevailing in criminal cases.

3. *Reviewability*

The majority reasons at length that a trier of fact's finding of discrimination is "reviewable." I agree. A decision that a prima facie case has been made out in either sense (i) or (ii) is of course reviewable by an appellate court, or trial court for that matter. With regard to version (i), the reviewable question is whether the evidence presented by the plaintiff is legally sufficient to allow the trier to find the basic facts that trigger the rebuttable presumption. With regard to (ii), the weaker version, the reviewable question is whether the plaintiff's evidence is legally sufficient to permit a trier to find discrimination. If the evidence is not legally sufficient, then no prima facie case is established and a finding of discrimination is "reviewable," i.e., clearly erroneous. Moreover, the employer may proffer evidence of a legitimate reason for the adverse employment decision so powerful that the plaintiff's prima facie case is undermined as a matter of law and is no longer sufficient

to create a material dispute of fact. *Burdine*, 450 U.S. at 255.

A pretext finding may also be reviewed and found to be clearly erroneous. *St. Mary's*, 509 U.S. at 524. Finally, as *Binder* explicitly stated, even if the proffered reason is pretextual, an employer may present evidence explaining the resort to the pretext and giving a legitimate reason for the adverse employment decision. 57 F.3d at 200. Again, that evidence may be so powerful that the inference to be drawn from the prima facie case and resort to pretext are undermined as a matter of law.

What cannot be logically said is that a prima facie case in sense (ii) has been established and sustained but that a finding of discrimination is clearly erroneous. One might as well say that the evidence was legally sufficient to allow the trier of fact to find discrimination, but that the trier of fact's finding of discrimination is clearly erroneous because the evidence was not legally sufficient. Much less can one logically say that a finding of discrimination based on a prima facie case and supported by an unexplained resort to pretext is clearly erroneous.

I therefore dissent.

United States Court of Appeals
For The Second Circuit

CYNTHIA J. FISHER,	:	94-7737 (L)
	:	94-7785
Appelle/Cross Apeelant	:	**NOTICE OF**
	:	**MOTION**
- against -	:	
	:	
VASSAR COLLEGE,	:	
	:	
Appellant.	:	
	:	

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby granted insofar as (1) the injunction of the district court, never having been stayed, remains in effect until the mandate is issued; (2) the issuance of the mandate is stayed pending the disposition of any timely petition for a writ of certiorari to the Supreme Court and the final determination of the appeal; and, (3) during the stay of the mandate, notwithstanding (1), the injunction issued by the district court is hereby modified to eliminate any requirement that Vassar evaluate the plaintiff for tenure.

September 26, 1995 Joseph M. McLanghlin per D. G. J.
Dennis G. Jacobs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CYNTHIA J. FISHER,	:	
Plaintiff-Appellee-Cross-Appellant,	:	Nos.
	:	94-7737
	:	94-7785,
- against -	:	94-9125
	:	(In Banc)
VASSAR COLLEGE,	:	
Defendant-Appellant-Cross-Appellee.	:	
	:	

STIPULATION

IT IS HEREBY STIPULATED that:

1. Both parties consent to the continuation in force of this Court's Order dated and entered in this action on September 26, 1995.

2. This stipulation shall be without prejudice to either party on (a) the petition for writ of certiorari, or (b) if there were to be any further stage of this action, on the merits.

July 2, 1997 CRAVATH, SWAINE & MOORE,

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SO ORDERED.

Ralph Winter, C.J.

42 U.S.C. Section 2000e-2

SECTION 2000e-2. Unlawful employment practices

(a) Empoyer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

29 U.S.C. Section 623

SECTION 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. Section 206 (d) (i)

Prohibition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Supreme Court, U.S.
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No. 97-0404 (2)

In the Supreme Court of the United States
October Term, 1997

CYNTHIA J. FISHER,

PETITIONER,

v.

VASSAR COLLEGE.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AAUW LEGAL ADVOCACY FUND, THE EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, THE NATIONAL WOMEN'S STUDIES ASSOCIATION, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE NOW LEGAL DEFENSE AND EDUCATION FUND, AND THE WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether the decision below conflicts with this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), by requiring a plaintiff in a Title VII action to adduce evidence of intentional discrimination beyond that deemed sufficient as a matter of law by this Court to sustain a verdict of discrimination.

2. Whether this Court should resolve a conflict among the circuit courts of appeals in interpreting *Hicks* as to the proper weight to be accorded a finding of pretext in proving an employment discrimination claim.

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INTEREST OF THE *AMICI CURIAE*

Amicus the American Association of University Women (AAUW) has over 160,000 members in 50 states and is

dedicated to promoting education and equity for women and girls. *Amicus* the AAUW Legal Advocacy Fund (LAF) is a nonprofit charitable organization dedicated to supporting women seeking redress for sex discrimination in higher education. LAF has monitored this litigation for several years because of its direct bearing on the fund's mission. It has more recently provided financial assistance to petitioner in her continuing litigation against Vassar, but has no financial interest in the outcome of this litigation. The AAUW and the LAF support the petition because the court of appeals' decision is inconsistent with their commitment to fair and equitable treatment, especially for women, in all higher education.

Amicus the Employment Law Center (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit organization dedicated to improving the working lives of disad-vantaged people. ELC represents indigent workers in cases involving employment discrimination and workplace rights, specializing in, among other areas, Title VII and the Americans with Disabilities Act. ELC has represented clients in numerous discrimination claims, including *United States v. City and Cty. of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988), *aff'd*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990), and has appeared as *amicus curiae* in cases such as *School Bd. of Nassau Cty. V. Arline*, 481 U.S. 1024 (1987).

Amicus Equal Rights Advocates (ERA) is a public interest law firm specializing in educational and litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based

discrimination, ERA has evolved into an organization with a multi-faceted approach to addressing women's issues. Its current work includes impact litigation, advice and counseling, public education, and public policy initiatives. Because economic independence is fundamental to women's ability to gain equality in other spheres of society, ERA has long focused on gender equality in the workplace, and has a particular interest in the judicial interpretation and implementation of Title VII.

Amicus the National Women's Studies Association (NWSA) was formed in 1977 to further the social, political, and professional development of Women's Studies throughout the country and the world at every educational level. The NWSA is committed to being a forum conducive to dialogue and collective action among women dedicated to feminist education and change. The NWSA's Academic Discrimination Task Force helps women educators and administrators who are victims of discrimination on the basis of gender, race, ideology, or sexual orientation. The Task Force maintains a legal fund which helps women defend themselves from employment discrimination in education, and maintains a letter writing network and a plaintiff-support network. The activities of the NWSA and the Task Force are dedicated to improving the status of women.

Amicus the New York Lawyers for the Public Interest, Inc. (NYLPI) is a non-profit law office that works to protect the rights of people with disabilities. Through its Disability Law Center, NYLPI seeks to protect and promote the civil rights and liberties of people with disabilities and enable them fully to participate in the mainstream of American life. NYLPI

has been extremely active on issues involving application of Title I of the Americans with Disabilities Act (ADA) to discrimination in employment, representing numerous individuals and filing *amicus curiae* briefs on its own behalf and on behalf of disability and civil rights groups in cases around the country addressing the application of the ADA. The issues presented in this case concerning the appropriate role of a finding of pretext under Title VII are also important to cases filed under Title I of the ADA, because of the potential for application of the standards developed under Title VII to Title I of the ADA.

Amicus the NOW Legal Defense and Education Fund (NOW LDEF) is a leading non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including employment discrimination barred by Title VII of the Civil Rights Act of 1964. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of employment discrimination laws, including *Harris v. Forklift Systems*, 510 U.S. 17 (1993), *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Amicus the Women's Legal Defense Fund (WLDF) was founded in 1971 as a national advocacy organization that develops and promotes public policies to help women

achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 23-year history, WLDF has placed special emphasis on equal employment opportunity by monitoring agencies' EEO enforcement, challenging sex-based discrimination in the courts, and leading efforts to promote employment policies such as the 1993 Family and Medical Leave Act and the 1978 Pregnancy Discrimination Act.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.[1]

SUMMARY OF THE ARGUMENT

The court of appeals' decision reflects a deep misunderstanding of the law governing the proof required to establish that an employer has discriminated in violation of Title VII of the Civil Rights Act of 1964. This Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), that a verdict that discrimination occurred may be supported by a finding that the employer has offered a pretextual explanation for its decision. In this case, the court of appeals affirmed as not clearly erroneous the fact-finder's conclusion that the respondent's explanation for its decision was pretextual. Under *Hicks*, that finding was sufficient to sustain the fact-finder's further conclusion that respondent discriminated

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[1] Pursuant to Supreme Court Rule 37.6, counsel certifies that this brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

against the petitioner. Thus, the court of appeals' conclusion of clear error on the ultimate issue of discrimination misread *Hicks* and overstepped appellate authority to review findings of fact under Rule 52 of the Federal Rules of Civil Procedure. The decision also deepened a conflict among the courts of appeals regarding the meaning of *Hicks* and the role of pretext in proving discrimination. The petition should be granted to correct these errors, and resolve the split in the circuits.

REASONS FOR GRANTING THE PETITION

The court of appeals' interpretation of Title VII substantially recast the burden-shifting framework for employment discrimination claims established and long adhered to by this Court. Its decision conflicts with rulings of this Court regarding the amount of evidence a plaintiff must adduce to sustain a verdict of discrimination, as well as the proper scope of appellate review for clear error under Rule 52 of the Federal Rules of Civil Procedure. The decision below also deepens a conflict in the courts of appeals on the interpretation of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). For each of these reasons, and because this case is a particularly apt vehicle for consideration of these issues, the petition should be granted.

1. In a line of decisions running from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), through *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Hicks*, this Court has carefully constructed a framework for the litigation of employment discrimination claims.

Recognizing that direct, "smoking gun" evidence of discrimination is rarely available, that framework permits a plaintiff to prove her case via inferences drawn from indirect evidence. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (noting that the "entire purpose" of the *McDonnell Douglas* framework is "to compensate for the fact that direct evidence of intentional discrimination is hard to come by").

Among the most common types of indirect evidence plaintiffs use is proof that when called upon to explain its actions, an employer has offered only reasons that are found to be pretextual. Such proof is powerful evidence of discrimination, both because it leaves the employer's actions unexplained, *see Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons have been eliminated . . . it is more likely than not that the employer . . . based his decision on an impermissible consideration such as race."), and because it undermines the employer's credibility while demonstrating its need to hide the genuine motive for its actions. Pet.App. 280a ("'Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct.'") (Newman, Ch.J., dissenting) (quoting *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995)).

This Court considered the proper place of pretext as proof of discrimination most recently in *Hicks*, holding that an inference of discrimination is not mandatory upon a finding of pretext, but that it is a permissible inference, even if the finding of pretext is (together with the elements of the *prima*

facie case) the entirety of the plaintiff's proof of discrimination. *Hicks*, 509 U.S. at 511 ("Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."). In short, under *Hicks*, a fact-finder may find discrimination based upon the plaintiff's *prima facie* case plus a finding that the employer has offered a pretextual explanation.

The court of appeals' ruling in this case is directly contrary to, and upsets the balance drawn in, *Hicks*. The panel sustained the district court's finding that respondent offered a pretextual explanation for denying petitioner tenure. Pet.App. 191a. The *en banc* court left this ruling in place. *Id.* Under *Hicks*, that should have been "enough at law to sustain a finding of discrimination." *Hicks*, 509 U.S. at 511 n.4. The court of appeals, however, held that it was *not* enough, reversing as clearly erroneous the trial court's explicit finding that the real reason was discrimination.

In reaching this conclusion, the court of appeals explained that a finding of pretext is not *always* sufficient support for a finding of discrimination. Pet.App. 198a-200a. As a result, it concluded, the decision to draw the inference of discrimination from the finding of pretext is reviewable for clear error under Rule 52. Pet.App. 203a. This unremarkable proposition, however, was utilized by the court of appeals in a fashion that mistook the exception for the rule.

As the dissent below noted, there are exceptional circumstances in which a valid finding of pretext would not necessarily provide sufficient support for a finding of discrimination. *See* Pet.App. 282a ("Obviously, if the

evidence points toward a motive other than discrimination, a pretextual explanation offers slight, if any, basis for inferring discrimination.") (Newman, Ch.J., dissenting). *See also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 261 n.3 (1st Cir. 1994); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (*en banc*). For instance, a plaintiff might disprove the employer's assertion of poor performance as the basis for discharge by showing that the real reason was the manager's need to cover up her own embezzlement. Such a showing would establish both that the proffered explanation was pretextual, but also that discrimination was *not* the real reason for the discharge.

It is, however, the exceptional case in which evidence will point toward a "third reason," belying both the explanation proffered by the employer and the discrimination alleged by the plaintiff. And it is rarer still that such evidence will point so strongly toward a "third reason" that the trier of fact clearly errs in rendering a finding of discrimination. That is why this Court in *Hicks* stated the general rule that a finding of pretext is enough to sustain a finding of discrimination. Here, the court of appeals substituted the implicit exception to that rule for the rule itself, and violated the limitations imposed by Rule 52, because it failed to defer to the verdict of discrimination despite the absence of evidence in the record of a "third reason."[2]

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[2] Even if cases where the inference of discrimination cannot follow from the finding of pretext are common rather than exceptional, the "third reason" scenario as a basis for assigning "minimal" weight to the finding of pretext, Pet.App. 200a, still requires some

The lack of evidence of a "third reason" is manifest from what the court of appeals did and did not say in this respect. It is striking that the majority below did not identify any evidence pointing in the direction of a "third reason." Pet.App. 274a ("[I]n this case, there was nothing in the record to support a finding that . . . any of the majority's other hypothesized explanations were the reason for Vassar's proffer of a pretextual explanation.") (Newman, Ch.J., dissenting). Instead, the *en banc* court simply stated that "the inaccuracies in Vassar's statements are explicable by so many equally possible motivations that none emerged with any persuasive force," Pet.App. 216a, while failing to identify the evidence in the record that rendered even one of those "possible motivations" not just "possible" but plausible as an alternative to petitioner's allegation of discrimination. Pet.App. 283a ("Evidence, not speculation about possibilities, will normally be the soundest basis for diminishing or even eliminating the probative force of a finding of pretext.") (Newman, Ch.J., dissenting). There are *always* "possible" explanations other than discrimination for why an employer has proffered a pretextual explanation. Thus, if the presence of such "possible" alternatives unsupported by actual evidence renders a finding of pretext insufficient, then pretext will never be sufficient -- a result

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evidence identifying and pointing to that reason. *See Burdine*, 450 U.S. at 255 n.9 ("An articulation not admitted into evidence will not suffice."). Of more direct relevance, finding clear error in a decision to infer discriminatory intent from pretext requires not just some evidence of a "third reason," but evidence sufficient to make the inference implausible. *See infra* pp. 13-14.

directly contrary to *Hicks*.[3]

Even if the court of appeals did not mean to render pretext legally insufficient as proof of discrimination in every case, it is perhaps the most disturbing feature of the decision below that it provided no guidance on how pretext findings are to be evaluated. So far as appears, it is an ad hoc process by which each appellate panel will simply use "common sense" to decide whether a particular finding of pretext "points nowhere," Pet.App. 32a, without apparent regard for the fact-finder's belief that it pointed in the direction of discrimination. By vesting appellate panels with unlimited discretion to judge the weight to be accorded a finding of pretext, the court of appeals eviscerated Rule 52's limitations on review of factual findings.

The decision below leaves plaintiffs in the position of having to adduce some direct evidence of discrimination, instead of or in addition to evidence of pretext. Nothing else

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[3] In *Hicks*, this Court observed that it is not too much to expect plaintiffs to respond to explanations for the employer's decision that are "lurking in the record," since it is by introducing evidence into the record rather than some formalistic pleading that the employer "articulates" its explanation, triggering the plaintiff's burden at the third stage of the *McDonnell Douglas* framework. *Hicks*, 509 U.S. at 522-23. Surely, however, it is too much to expect plaintiffs preemptively to respond to all "possible" explanations, up to and including even those not supported by evidence in the record -- especially since allowing fact-finders and appellate courts to rely on unsupported speculation allows them "to act on their unfounded and inaccurate assumptions about discrimination." Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 Conn. L. Rev. 997, 998 (1994).

would point the fact-finder strongly enough in the direction of discrimination and away from the myriad alternative "possibilities" to insulate even a favorable verdict from appellate reversal. This defeats one of the central purposes of the *McDonnell Douglas* burden-shifting framework, which is to relieve plaintiffs of the Herculean burden of producing a "smoking gun" showing the employer's discriminatory animus.

Indeed, the court of appeals' reliance on speculative "possibilities" unsupported by evidence goes beyond even the prediction of Justice Souter's dissent in *Hicks*, which argued that the Court's opinion would compel plaintiffs to respond to "any conceivable explanation for the employer's actions *that might be suggested by the evidence*." *Hicks*, 509 U.S. at 537 (emphasis added). Under the decision below, even responding to every shadowy possibility suggested by the evidence will not suffice, for there will lurk yet other "possibilities" that *might* have motivated the employer. Only the plaintiff's presentation of some affirmative evidence that points the fact-finder explicitly in the direction of discrimination as *the* explanation will suffice; that is, only direct evidence will do.[4]

The proper rule under *Hicks*, *amici* submit, is that, absent

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[4] Beyond placing an unprecedented burden on plaintiffs, this standard renders the entire burden-shifting framework meaningless, since a plaintiff who has direct evidence to present need not rely on the *McDonnell Douglas* framework in the first place. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

unusual circumstances, a *prima facie* case and a finding of pretext provides the support necessary to insulate a verdict of discrimination from reversal under Rule 52.[5] *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*) (where evidence is sufficient to prove pretext, and jury has found discrimination, court considering motion for judgment as a matter of law "may not pretermit the jury's ability to draw . . . the inference of intentional discrimination"), *cert. denied*, 65 U.S.L.W. 3862 (1997). *Hicks* constitutes a sort of scale, telling the courts of appeals that in their conduct of clear error review, pretext is sufficiently weighty to sustain a verdict of discrimination

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[5] In explaining its view of pretext, the court of appeals said:

> Generally speaking, the stronger the evidence [apart from pretext] that illegal discrimination is present, the greater the likelihood that discrimination is what the employer's false statement is seeking to conceal. And, conversely, the weaker the evidence of discrimination, the less reason there is to believe that the employer's false statement concealed discrimination, as opposed to the numerous other reasons for which employers so frequently give false reasons for employment decisions.

Pet.App. 219a-220a. Under this rubric, a plaintiff with convincing evidence that the employer lied, but with little other evidence of discrimination, will have provided the fact-finder with an insufficient basis to find that discrimination occurred. Rather than being a principal method by which discrimination is shown, pretext will become a mere appendage to the presence or absence of direct evidence. The absence of evidence other than pretext might well lead the fact-finder to refuse to draw the inference of discrimination permitted by *Hicks*, but it does not undermine the inference where, as here, the fact-finder does draw it.

unless the evidentiary record points so strongly in a specific different direction that the court of appeals is "left with the 'definite and firm conviction'" that discrimination could not have been the true reason. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). If, conversely, discrimination *could* plausibly have been the reason, a finding of pretext is sufficient for the fact-finder to conclude that it *was* the reason. The court of appeals exceeds its authority, and renders the "clear error" standard meaningless, if it reverses such a conclusion. *See Anderson v. Bessemer City*, 470 U.S. 564, 576-77 (if reviewing court "cannot say that either interpretation of the facts is illogical or implausible," then it should not find the fact-finder's choice to be clearly erroneous).

In expanding the scope of clear error review, the court of appeals majority, not surprisingly, contended that the dissenters' position would nullify Rule 52. Pet.App. 210a-211a. This fear was unfounded. There is no dispute that clear error review is appropriate in discrimination cases litigated under the *McDonnell Douglas* framework. Of course, it is. Rather, the issue is the proper standard to be applied by the courts of appeals in conducting that review. In short, *amici* urge that, while a finding of discrimination may be clearly erroneous, it is not clearly erroneous *because it was supported "only" by a finding of pretext.*[6] In failing

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[6] In making this point, *amici* do not concede that the finding of discrimination was supported by nothing more than the finding of pretext. First, the *en banc* majority's fixation on the finding of pretext as such

to give the finding of pretext its proper weight, the court of appeals overstepped, both under *Hicks* and under Rule 52. Its decision should be reviewed, and reversed.

2. Besides failing to adhere to *Hicks*, the decision below also deepens a conflict among the circuit courts on the interpretation of that case. This Court should grant the petition to resolve the conflict and provide needed guidance to the lower federal courts. The issues should be taken up in *this* case because it involves two elements -- collective decision-making, and a record presenting proof of gender-based stereotypes – that illustrate with particular potency the importance of maintaining the *McDonnell Douglas* framework to permit plaintiffs to prove discrimination through inferences drawn from indirect evidence.

a. The circuit courts of appeals are deeply divided on the role pretext plays in employment discrimination cases. The majority have held that, under *Hicks*, evidence sufficient

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led it to ignore the evidence underlying that finding as probative of discrimination. Plaintiffs often seek to demonstrate pretext by showing that similarly situated employees outside the protected group were treated differently; petitioner utilized such evidence here. *E.g.*, Pet.App 112a-113a (findings of differential standard used in judging teaching evaluations of male tenure candidates). Such comparative evidence is probative of pretext, but it is also independently probative on the ultimate issue of discrimination. Second, as argued in the petition, the court of appeals failed to consider substantial evidence of gender-based stereotypes employed by respondent's decision-makers, Pet. 21-24, evidence that amply supported the trial judge's decision to infer discriminatory intent. Our point is that even if pretext had been the sole support for the finding of discrimination, that was not a basis for declaring that finding clearly erroneous.

to create a genuine issue of fact as to pretext also creates a triable issue on the ultimate issue of discrimination, precluding summary judgment for the employer. *See Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 885 (D.C.Cir. 1997) ("[B]ecause evidence sufficient to . . . discredit the defendant's proffered nondiscriminatory reason is evidence sufficient to permit the factfinder to find intentional discrimination . . . summary judgment for the defendant must not be granted when such evidence has been presented."); *Sheridan*, 100 F.3d at 1067; *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996); *Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1381 (10th Cir. 1994); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997). These cases recognize the point missed by the court of appeals here: an employer's proffer of a false reason for its actions provides a sufficient basis for a verdict of discrimination.

Including this case, four courts of appeals have departed from the central teaching of *Hicks* by holding that a finding of pretext may not be sufficient to support a finding of discrimination. *See Woods*, 30 F.3d at 257; *Rhodes*, 75 F.3d at 994; *Kehoe v. Anheuser-Busch, Inc.* 96 F.3d 1095, 1102 (8th Cir. 1996). Like the decision below, these cases discuss hypothetical, exceptional circumstances as a justification for a wholesale rejection of the proper place assigned to pretext by *Hicks*. For example, *Woods* described one such exceptional circumstance to hold that summary judgment is not *always* improper where the plaintiff has demonstrated a

genuine issue of fact as to pretext. *See Woods*, 30 F.3d at 261 n.3. Subsequently, the First Circuit has applied what might have been a narrow and largely hypothetical[7] exception to *Hicks* as if the need to show more than pretext is the general rule. *See Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 38-42 (1st Cir.) (affirming summary judgment without consideration of whether plaintiff offered sufficient evidence to permit finding that employer's proffered explanation was pretextual, or why pretext would not be sufficient), *cert. denied*, 116 S. Ct. 914 (1996). In light of the widening gap between the courts of appeals regarding the relationship between findings of pretext and of discrimination, the moment has arrived for this Court to resolve the conflict.[8]

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[7] *See Aka*, 116 F.3d at 884 (the "hypothetical" situation posited in *Woods* "seems extraordinarily unlikely," because it would require evidence to be placed into the record supporting a position advanced by none of the parties).

[8] The pressing need for resolution of this conflict, and for guidance on the place of pretext in proving discrimination, is demonstrated by the confused state of the law in the Eighth Circuit. In first considering the meaning of *Hicks* in 1994, that court held that if "there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons . . ., then the evidence is sufficient to allow the jury to determine whether intentional discrimination occurred, and we are without power to reverse a jury's finding." *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir.), *cert. denied*, 115 S. Ct. 355 (1994). This was a correct statement of the teaching of *Hicks*.

Only months later, however, another panel of the same court

b. Finally, the fact that this case involves a challenge to a decision to deny tenure, and the presence of gender-based stereotypes, make it particularly important to grant the petition. Tenure denials are collective decisions -- attributable to a departmental committee, for example, or the various recommendations of numerous officials -- made after several stages of review. As a result, many disparate motives may be in play, and various actors may have quite different reasons for their positions. In such circumstances, careful application of the framework for litigating discrimination cases is most important, because the need to limit the scope of the litigation by framing the factual issues -- core purposes of *McDonnell Douglas* -- is at its height. *See Burdine*, 450 U.S. at 255-56 (purpose of compelling employer to articulate

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endeavored in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994), to limit *Gaworski* (and by extension *Hicks*) to cases in which evidence of pretext serves "double duty" -- that is, that it "serve[s] the additional purpose of permitting an inference that . . . discrimination was a motivating factor in a plaintiff's termination." Unfortunately, the decision in *Nelson*, like the decision below, provided no guidance to distinguish those cases where pretext serves this "double duty" from those where it does not. More fundamentally, the purported distinction fails to recognize that *Furnco* and *Hicks* established that evidence of pretext *by its nature* serves such "double duty" and permits an inference of discrimination. In spite of this, the Eighth Circuit later characterized the cases in which it does so as "presumably rare," and indicated that plaintiffs routinely must introduce "independent proof of intentional discrimination" to buttress the probative force of the evidence of pretext. *See Kehoe*, 96 F.3d at 1102. The Eighth Circuit's confusion is symptomatic of the courts of appeals in general, making manifest the need for guidance from this Court.

its explanation is "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext").

That, in part, is what the *prima facie* case is designed to do -- compel the employer (which is, after all, in the best position to know why it acted) to come forward with an explanation, thus defining and limiting the scope of the litigation. The court of appeals' decision makes it impossible for the plaintiff to avoid having the case be about the motives of every individual who influenced the decision, because the trier of fact may seize on any of those motives as the elusive "third reason." Worse, even if the trier of fact sifts through those many motives and concludes at the end of the day that discriminatory animus explained the decision, the appellate court -- noting the "possibility" of other motives -- can overturn the verdict under Rule 52. It is difficult to envision how such litigation could be managed. And even if it could be, it would afford only the rare plaintiff with direct evidence of the employer's discriminatory intent a full and fair opportunity to prove her case.

These difficulties of proof are still more pressing where the plaintiff relies, as here, on evidence that gender stereotypes influenced some or all of the individuals involved in the decision. Pet.App. 305a-307a (Newman, Ch.J., dissenting). The importance of proper application of the *McDonnell Douglas* framework is greatest when the use of stereotypes forms part of the basis for the plaintiff's claim (and here, the fact-finder's conclusion) that discrimination was the real reason for an employment decision. Stereotypes -- like the notion that women who have interrupted their careers for

family reasons are either less serious about their careers or less able than men (or other women) without such responsibilities -- may be subtle. The ways in which they affect decision-makers' perceptions can be even more so. Disregarding them as evidence of discriminatory animus, and hence as proof supporting the conclusion that an employer's pretextual explanation was a pretext *for discrimination*, undermines this Court's decision in *Price Waterhouse* that an employer's use of gender-based stereotypes violates Title VII. The court of appeals' failure to address the evidence of stereotyping as proof of discrimination will have exactly this consequence, further warranting this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.[9]

Respectfully submitted.

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[9] It is noteworthy that the Equal Employment Opportunity Commission participated in the case below as *amicus curiae* in support of the petitioner. Pet.App. 187a. In light of the fact that the court of appeals has taken a position which conflicts with that of the agency charged with interpretation, administration, and enforcement of Title VII, *amici* respectfully suggest that this would be an appropriate occasion for the Court to request that the Solicitor General provide the views of the United States on whether *certiorari* should be granted.

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No. 97-404

IN THE

Supreme Court of the United States

October Term, 1997

CYNTHIA J. FISHER,

Petitioner,

v.

VASSAR COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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October 9, 1997

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether facts that do not inevitably, naturally or logically give rise to an inference of discrimination preclude or limit appellate review of a lower court's conclusion of discrimination?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

This is to certify that respondent Vassar College has no corporate parents or non-wholly owned subsidiaries.

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FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for a writ of *certiorari* seeking review of opinions of the Court of Appeals for the Second Circuit reported at 114 F.3d 1332 and 70 F.3d 1420.

COUNTERSTATEMENT OF THE CASE

The petition attacks the court of appeals for "rulings" the court never made and asserts a split in the circuits on an issue not presented by the facts of this case.

The action concerns charges of unlawful discrimination under Title VII (42 U.S.C. § 2000e *et seq.*), the Age Discrimination in Employment Act ("ADEA", 29 U.S.C. § 623(a)(1)) and the Equal Pay Act (29 U.S.C. § 206(d)(1)), in connection with the denial of tenure to a Vassar biology professor.

As her first argument in support of the petition, petitioner asserts that the court of appeals improperly substituted its judgment for the district court's in accepting hypothetical reasons for the college's decision in lieu of a plausible finding of unlawful discrimination made by the district court (Pet. 5-7). In point of fact, the court of appeals reversed the judgment below because the discrimination finding could not be sustained by *any* evidence of record, or by any inferences tenably arising from such evidence, and because it was petitioner's burden, in making charges of discrimination, to substantiate them.

To show a split in the circuits—petitioner's second and principal argument for *certiorari*—petitioner points to a disagreement between decisions in the First and Fifth Circuits on the one hand, and those in the D.C., Third, Sixth and Eleventh Circuits on the other hand (Pet. 7-10).[1] The stated rationale of the passages that petitioner cites in the latter group of opinions (whether holding or dictum) is that (1) a natural and logical inference of unlawful discrimination can *always* be drawn from an employer's explanation that is proven to be mendacious, so that (2) a district court's sustainable finding of "pretext" based on such mendacity must *always* render unreviewable its ultimate finding of unlawful discrimination.

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[1] *Smith v. Stratus Computer, Inc.*, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*); *but see Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir.), *vacated and reh'g en banc granted*, __ F.3d __, 1997 WL 569524 (D.C. Cir. Sept. 5, 1997); *Sheridan v. E. I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), *cert. denied*, 117 S.Ct. 2532 (1997); *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3171 (July 28, 1997).

We believe the first proposition to be invalid, and the second to be an unsound departure from normal rules of appellate review as well as from the teaching of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). But neither proposition applies here, since no conduct even resembling "mendacity" was ever proven in this case.

Certainly one cannot assume "mendacity" from the mere fact of a sustained finding of pretext. As this Court stated in *St. Mary's*, the "factfinder's disbelief of the reasons put forward by the defendant" may not necessarily be "accompanied by a suspicion of mendacity" (509 U.S. at 511), and "surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar" (*id.* at 520).

Moreover, one cannot identify any facts in this record to support any finding of "mendacity". The only evidence specifically cited by the court of appeals in aid of the district court's ultimate finding of "pretext" was a tabulation of student appraisals prepared by petitioner's expert that the appellate court said "arguably" indicated that petitioner was a "good" teacher, despite substantially declining student evaluations during the period 1982-85 (232a, 234a-35a n.10).

There is, in sum, nothing about this case that raises a certworthy issue. Although some courts have erroneously opined, contrary to *St. Mary's*, that mendacious "pretext" plus the *McDonnell Douglas Corp. v. Green* four factors (411 U.S. 792, 802 (1973)) so invariably and necessarily give rise to an inference of discrimination as to render a district court decision to that effect unreviewable (*e.g.*, *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 885 (D.C. Cir.), *vacated and reh'g en banc granted*, __ F.3d __, 1997 WL 569524 (D.C. Cir. Sept. 5, 1997); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993)), none has reasoned to that result in the absence of mendacity, which are the facts here presented.

Indeed, to say that every time an employer declines to promote an employee, and the court disbelieves the stated reason, the real reason must have been unlawful discrimination, is not, of course, a defensible proposition. Nor does it improve materially, we submit, when the evidence additionally establishes that the employer chose between two qualified candidates who differed from each other in their ethnicity, religion, sex or race (which fact pattern—all that the *McDonnell Douglas* four factors require—would encompass most promotion decisions made every year in the United States).

Furthermore, this is scarcely a case in which the district court itself can be said to have inferred unlawful discrimination from a finding of "pretext" alone. The panel, in fact, read the district court opinion as acknowledging that no inference of discrimination could be drawn without the voluminous, so-called "discrimination-in-fact" findings, all of which the court of appeals overturned (31a, 57a).

There may well be, then, misreadings of *St. Mary's* to correct, and a split in the circuits to resolve; but if such functions are to be performed, the vehicle should be a case, unlike the present, that necessarily gives rise to the issue about which the circuits are actually debating.

A. Vassar's 1985 Tenure Decision with Regard to Petitioner, and the District Court's Conclusion with Respect Thereto.

At trial, petitioner claimed "sex-plus discrimination" under Title VII, based on her status as a married woman and the fact that she was not granted tenure as a biology professor at Vassar. Despite petitioner's explicit concession at trial that age was "not in the case", the district court, *sua sponte*, suggested that an age claim under ADEA be added (61a). The district court also allowed petitioner to amend her complaint, at the conclusion of her case, to add a charge of discrimination under

the Equal Pay Act (66a). The court then decided all such claims in petitioner's favor (165a, 171a, 174a).

Vassar had evaluated petitioner, however, as it did all candidates for tenure, on the basis of her scholarship, teaching ability, leadership and service to the college (9a). The initial report and recommendation was prepared by the tenured professors of the biology department, who were unanimous on the question (*id.*). Their report was then approved by reviews conducted at four different levels, all of which were also unanimous: the dean of the college, the Faculty Appointments and Salary Committee ("FASC"), the president of the college and the board of trustees (9a, 15a).

Petitioner is (and was in 1985) a married woman with children. Of the five tenured professors within the biology department who assessed her qualifications, four were women with children, including Dr. Patricia Johnson (229a-30a) who had been the chairperson of the department for nine years. Of the five members of the FASC (two women; three men), all were married and had children—as were the dean of the college and almost every member of the board.

The same year in which petitioner's tenure review was conducted, Vassar granted tenure to eight professors, six of whom were women, three married women (Dft. Exh. AB at E675-76, Tr. 2065, 2067)[2] (and another, Dr. Penina Norrod, who received tenure in the biology department, was in an established and long-standing relationship with a man she soon married, 50a). From 1977 to 1985, there were 72 tenure reviews at Vassar: 35 candidates were women, 27 of those women received tenure; and 18 of those then-tenured women were married (Dft. Exh. AB at E671-76, Tr. 2065, 2067).

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[2] "E__" citations are to the Joint Exhibits in the court of appeals; citations to "Tr. __" are to the transcript in the district court.

During the period 1972-84, of the 23 married women considered for tenure, 18 succeeded (51a).

To perceive "sex-plus" discrimination here and to find the biology department report a "pretext" for it required, among other things, a determination to disregard all such evidence. This, the district court did (a) by refusing to admit any evidence of college-wide tenure decisions (51a), (b) by defining the "protected class" as limited to women professors in "hard" sciences (47a), (c) by defining "hard" sciences to delete psychology (49a), and (d) by excluding (i) women with children but between marriages (49a-50a), (ii) women who were married but not, by petitioner's anecdotal evidence, "perceived" to be married (*id.*), (iii) previously married women with established and long-term relationships with men (*id.*), and (iv) married women who were co-members of the Vassar faculty with petitioner but were granted tenure between 1986-90 (53a-54a). Every fact that contradicted the narrowing of petitioner's class or the thrust of her "statistics" was ruled by the district court to be either insufficient for that purpose or inadmissible.

Petitioner having thus established the minimum *McDonnell Douglas* four factors (Dr. Norrod, the Vassar biology professor who received tenure in 1985, being deemed by the district court to have been in a different class from petitioner despite having been previously married and then in a long-standing relationship that led to marriage, 50a), Vassar came forward with its *McDonnell Douglas* "explanation", which, as noted, consisted of the grounds of the report and recommendation of the biology department (23a) that had been reviewed and accepted, under college-wide standards, up through the reviewing chain (13a, 15a).

In the opinion of the district court, all such grounds were "pretexts" (165a), most articulated in "bad faith" (*e.g.*, 79a-87a). (These findings, as we show below, were either explicitly overturned or, to the extent not expressly addressed

by the court of appeals, self-evidently unsustainable.) Moreover, although the lower court apparently deemed the finding of "pretext" itself to be an insufficient basis for a conclusion of discrimination (31a), the court found "discrimination-in-fact" evidence in various anecdotes from unhappy former members of the Vassar biology department (who had not been considered for tenure) (33a-36a) and in petitioner's "statistics" (44a-56a).

B. The Initial Panel Opinion of the Court of Appeals.

A unanimous panel of the court of appeals reversed as clearly erroneous, an abuse of discretion, or both, every district court finding of discrimination (57a, 66a, 70a) as well as virtually all the findings of "pretext" that the court of appeals considered (27a n.7, 28a). And the bases for those express reversals have considerable relevance to the nature of the findings that the court did not specifically address.

For example, as to alleged "discrimination-in-fact" evidence, petitioner had offered a letter (not testimony) from a former Vassar assistant professor to the effect that her "sense of being discriminated against" on the basis of having children was so high (despite the fact that almost everyone in the department and up the reviewing chain also had children) that, when she discovered she was pregnant, she "voluntarily and secretly had an abortion" (35a). Although this letter was allowed into evidence, not for the truth of its contents, but to show that notice had been given to the college of the writer's allegations, and although the alleged discriminated-against class was married women, not women with children, the district court, as the court of appeals stated, "cited this letter—and specifically noted the story of the compelled abortion—to support findings of discrimination" (35a-36a).

Petitioner's "statistical model" (which no expert in statistics validated, 44a n.10), was, as the court of appeals held,

> "built on gerrymandered data and a series of statistical fallacies. A spurious correlation between the marital status of women and their promotion in the 'hard sciences' at Vassar is created (a) by purposefully defining which sciences are hard and which are not; (b) by treating anecdotes as statistics; (c) by disregarding the pattern of school-wide tenure decisions; (d) by overlooking women who did achieve tenure in hard sciences; (e) by comparing married women to single women rather than by comparing women of each status with men similarly situated; and (f) by conflating marital status with status as a parent." (47a)

Indeed, as the court of appeals further noted, although Vassar itself, throughout the relevant period, had grouped psychology with other "hard" sciences within the same "Division III classification of Vassar's administrative structure" (47a), although Vassar had adduced direct evidence as to why psychology was as "hard" a science as others in that group,[3]

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[3] For example, the Dean of the College, in describing psychology as a "hard" science, gave the following testimony that was neither answered nor answerable:

> "Psychology at Vassar, as well as psychology throughout the nation[,] is an academic field, as opposed to . . . a clinical field, [and] as an academic field is based on the same experimental methodology that biology and chemistry, physics are based on.
>
> "It especially holds close paradigms and methods with biology. As there is great variety in the biological discipline, there's also a great variety in psychology. But our majors are required to take laboratory courses in experimental methodology, they are required to take

and although petitioner offered no evidence whatever to the contrary (49a), the district court, without explanation, accepted petitioner's exclusion of all data regarding the psychology department from petitioner's "statistics" (47a-48a).[4]

Additionally, the district court accepted *carte blanche* petitioner's misidentification of the status of married women as unmarried, and *vice versa* (49a-51a), and her exclusion from the sample of all tenure-track women hired while petitioner was at Vassar unless they had left prior to or during 1985 (52a-54a). As a result, as the court of appeals noted,

> "the most promising and successful of plaintiff's married female colleagues were excluded from the statistical model.

> courses in statistics, they are required to explore the primary scientific evidence, they are required to do experimental and other sorts of studies as part of their undergraduate education.
>
> "It is very much an experimental science. Many of our subjects are people, but nevertheless, an experimental science." (48a, *quoting* Tr. 2217-18)

[4] Given the panel's exhaustive demolition of the findings accepting petitioner's "statistics" (44a-56a), it is difficult to understand how petitioner continues to rely on these "statistics" (Pet. 20 n.4), as though they had never been debunked.

Equally remarkable is petitioner's characterization as "unrebutted" (Pet. 20) "expert testimony" that the court of appeals found to be of "no probative bearing" (57a) because predicated on "statistics that are insubstantial, immaterial and riven by fallacies" (*id.*) and therefore "not based on credible evidence" (*id.*). To leave no doubt on the subject of whether this testimony was "unrebutted" or the contrary, the appellate court held that "the district court's adoption of [the expert's] conclusion was clearly erroneous" (*id.*).

> "There were six married female Vassar professors in the natural sciences who were in tenure-track positions at the time Fisher was denied tenure. Most did quite well." (52a-53a)

The fact that, in the very departments defined by petitioner as "hard" sciences, four tenure-track married women who were teaching at Vassar at the same time as petitioner were granted tenure after petitioner had left (54a) was explained away by the district court by surmising that Vassar must have changed its policy once petitioner had left (53a n.11).[5]

As to "pretext", of the "facts" the district court found supportive of the conclusion, the court of appeals expressly reviewed approximately half and rejected virtually all those findings on the ground that the record proved exactly the opposite, or that the findings were "unfounded", "unsubstantiated" or "conclusory" (27a-28a & n.7). It is far from obvious what the court of appeals considered to be sufficient evidence to uphold the district court's ultimate finding of "pretext" as not clearly erroneous; but it is clear that the court did *not* endorse *any* findings of "bad faith", that other "pretext" findings were deemed erroneous (27a n.7), and that

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[5] Although the 1985 cut-off was applied to exclude evidence favorable to Vassar regarding married-women professors receiving tenure after that date, the cut-off was ignored when it came to evidence favoring petitioner. For example, in comparing the quality of the publications of male tenure candidates with those of petitioner, the district court focused on a man tenured in 1987 (83a).

It might also be noted that, while the charge made in this case was gender-based discrimination, not discrimination solely on the basis of marriage, the lower court gave little attention to the fact that, in 1985, the other professor denied tenure in the Vassar biology department was a man, and the person granted tenure was a woman (15a).

the few findings of "mistakes" the court apparently thought Vassar had made (26a-27a) were plainly not considered mendacious (30a-31a), nor could they have been.

For example, the panel stated that the biology department had referred to petitioner's hiatus from the field as being ten years (40a), whereas the biology department report had noted nine years (Pl. Exh. 8 at E217, Tr. 249), and the district court had found the figure to have been "at most" eight years (128a). In fact, however, petitioner herself had represented to the National Science Foundation, on her grant application, that she had experienced a "ten year hiatus" (Pl. Exh. 62A at E425, Tr. 121); and petitioner variously testified in this case that her "hiatus" was eleven years (Tr. 735), "eight years" (Tr. 736) and "seven years" (Tr. 21). In all events, if there were any "mistake" here by Vassar, it was properly not regarded by the court of appeals as material or as grounds for a finding of "pretext", let alone evidence of mendacious behavior.[6]

Furthermore, while the panel decision as well as the separate *en banc* opinions of Judges Jacobs and Calabresi suggested that further review of the district court findings would yield further conclusions of clear error (27a n.7, 231a n.8, 254a n.13), there was no indication of what facts would

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[6] Also, the panel recited the contrast that the district court drew between petitioner's "9 months in the laboratory" during her sabbatical year and what the district court termed the biology department's description of "brief intermittent periods" (26a) (overlooking the fact that the department had itself noted the months involved). Although the panel might, therefore, have believed that the department had committed an error of omission, mistakenly agreeing with the district court in that respect (*see* p. 28 & n.17, *infra*), it did not agree that any such "error" gave rise to an inference of "bad faith", much less constituted "mendacity".

support the district court finding of "pretext" except for one passage in Judge Jacobs's concurrence:

> "Dr. Fisher testified about charts prepared for trial by her own counsel tabulating the numerical results of the student evaluation sheets for Dr. Fisher and the other specified candidates. These charts arguably support the idea that Dr. Fisher was a good teacher (hence the adequately supported finding of pretext)." (232a)[7]

In the light of that statement and the panel's conclusion of law that the ruling in *St. Mary's* applied (32a), the court had no need either to assess the remaining "pretext" findings for error or to identify whether there were any additional sustainable findings that might supplement that statement. The judgment below had to be reversed, in the court's view, for the absence of any evidence of discrimination.

C. The *En Banc* Decision.

Following rehearing *en banc*, seven of the eleven judges comprising the *en banc* court agreed with the panel's conclusion of law (that a sustained finding of "pretext" does

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[7] Although this conclusion was "arguable", the facts particularized in Judge Jacobs's concurrence demonstrate it to have been marginal at best, given the sharp decline in the students' ratings of petitioner's performance during the five years prior to her tenure review:

> "the percentage of students who ranked her in the top category for clarity declined from 39% to zero, and . . . the percentage who ranked her in the top category for ability to illuminate declined from 52% to zero. With respect to an advanced class . . . none of Dr. Fisher's students gave her a top rank and only 20% gave her a rank of four for ability to illuminate. (People who find this information insignificant have forgotten their college days)." (234a-35a n.10)

not preclude appellate review for clear error of an ultimate finding of discrimination) and, by limiting themselves to that issue, left standing the panel's overturning of findings and reversal of the judgment below (188a & n.1). In a separate opinion, concurring in the legal conclusion and dissenting in part, Judge Calabresi opined that, while he would personally rule that petitioner had failed to prove her claims, the case should be remanded to the district court for a determination as to whether the findings that were not overturned would still, in the district court's view, warrant the ultimate conclusion of discrimination (252a-53a).[8]

The dissenting opinion of then Chief Judge Newman, in which Judges Kearse, Winter and Cabranes concurred, took the position that sustainable findings of a *McDonnell Douglas prima facie* case plus "pretext", while not utterly precluding appellate review of an ultimate finding of discrimination, would (a) require the defendant, by "overwhelming" evidence,

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[8] Although Judge Calabresi indicated that there were additional district court findings, not specifically addressed by the court of appeals, which were also erroneous, and which, had his views been followed, would have had to have been expressly reviewed, nevertheless:

> "Because of the disposition of the case, it would only waste time to go over each of the alleged errors. I will point out one, that actually goes primarily to the existence of a pretext rather than directly to the ultimate question of discrimination." (254a n.13)

The "one" error that Judge Calabresi then discussed was an error that effectively overturned all the district court's findings concerning Vassar's judgment with respect to the rankings of the academic journals in which petitioner had published (and Judge Calabresi noted that a majority of the court had authorized him "to say that they agree with these observations", *id.*).

either to disprove discrimination or "establish" a "third reason" (*i.e.*, a reason for denying the job other than unlawful discrimination or the first proffered "explanation"), and (b) insulate the finding of discrimination from review if the defendant failed to do so (270a, 281a-85a, 291a). Although Judge Winter concurred in that result, he wrote a separate dissenting opinion (joined by the three other dissenters) in which he concluded that sustainable findings of the *McDonnell Douglas* four factors were themselves sufficient to support the result proposed by Judge Newman's opinion (325a).

REASONS FOR DENYING THE WRIT

I.

THE SPLIT IN THE CIRCUITS CONCERNS AN ISSUE NOT PRESENTED BY THE FACTS OF THIS CASE.

1. In *St. Mary's*, this Court stated:

> "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted on remand in this case under the 'clearly erroneous' standard. . . ." (509 U.S. at 524)

We understand that passage to make clear that a sustainable finding of "pretext" does not preclude appellate review of an ultimate finding of unlawful discrimination—indeed, that it is precisely such an ultimate finding that is "subject, of course, to appellate review" and that such a review "should be conducted . . . under the 'clearly erroneous' standard".

Moreover, this Court, earlier in the *St. Mary's* opinion, had recognized that a finding of "pretext" could reflect either a "factfinder's disbelief of the reasons put forward by the

defendant" or such disbelief "accompanied by suspicion of mendacity" (*id.* at 511). It therefore necessarily follows that a sustainable finding of "pretext", even when coupled with such "a suspicion of mendacity", does not preclude appellate review of an ultimate finding of discrimination, even if an inference (if any) arising from the combination ("pretext" with mendacity) might be stronger than that (if any) based on "pretext" alone.

We further believe that the contrary rule urged by a number of circuits would be exactly the sort of "rigid", "mechanized" and "ritualistic" methodology decried by this Court in *St. Mary's* (509 U.S. at 519). No inference of fact X should be drawn from fact Y unless the existence of Y makes X more probable than not. *See Leary v. United States*, 395 U.S. 6, 36 (1969). In some cases, the grounds for the district court's disbelief of the employer's explanation might warrant an inference of discrimination; and in other cases (*e.g.*, the many examples discussed in the Second Circuit *en banc* opinion, 198a), it would not. To hold, then, that such disbelief must *always* preclude a "clearly erroneous" conclusion on review is to hold, contrary to reality, that such disbelief can *always* give rise to such an inference. Such a rule would, in effect, convert a sustainable finding of "pretext" into a *conclusive* presumption of unlawful discrimination at the option of a district court judge, no matter how manifestly absurd that ultimate conclusion.

We submit that there is nothing about this issue that would justify insulating district court rulings from the normal process of appellate review. On all other issues district court findings of fact are subject to appellate scrutiny under the "clearly erroneous" standard (Fed. R. Civ. P. 52(a)). Why not findings of discrimination? Acknowledging the difficulties to claimants of adducing direct evidence of discrimination does not warrant the grant of judgments against defendants on no evidence of discrimination at all.

2. Moreover, the approach urged by the dissenting opinions in the present case, as well as by petitioner and the *amici*, would be at least equally mechanistic and unsound.

In their view, the district court's disbelief of the employer's explanation should impose the need on the employer to "establish" by "overwhelming" evidence a "third reason" (270a, 281a-85a, 291a, *Am.* Br. 9) (*i.e.*, not unlawful discrimination; not the original "explanation"; but some other ground for not promoting or hiring the claimant). For this procedure to work, even mechanistically, one must imagine a trial somewhat like a tennis match: the claimant serves first and establishes the *McDonnell Douglas* four factors; the employer serves next and offers its "explanation"; the claimant then attempts to disprove the "explanation" and to offer such other evidence of discrimination that the claimant has; the employer, if it thinks the claimant's evidence effectively disproves the "explanation" (or perhaps on some signal from the judge or jury that it has), then gets an opportunity "overwhelmingly" to "establish" a "third reason".

But, of course, a trial is not conducted in that fashion. The rule advocated by the dissenting opinions, petitioner and *amici* would effectively require the employer, in its case in chief, to proffer its "explanation" with an "overwhelmingly" supported aside, "And if you don't believe that one, here is my 'third reason!'"

Nothing in *St. Mary's* or in the nature of the governing statute would warrant such a rule.

When (if at all) an inference of prohibited discrimination naturally and logically arises from the claimant's evidence, including evidence disproving the employer's "explanation", then the claimant should win if the employer lacks evidence overcoming that inference. On the other hand, when an inference of unlawful discrimination does *not* naturally and logically arise from the claimant's evidence, then the claimant

should not win; for in that instance, obviously, the claimant hasn't proven his or her charges. Distorting such results with mechanistic rules is to legislate against logic.[9]

3. While petitioner, *amici* and the dissenters in this case disagree with the opinions petitioners rely on in other circuits as to the mechanisms they propose, it is not surprising, since they all advocate mechanistic approaches, that they all proceed from the same premise. And it is that premise that distinguishes those decisions or *dictum* from the facts of the present case.

For example, in *Aka*, the D.C. Circuit panel quoted with approval the Seventh Circuit *dictum* in *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (1990), that

> "[i]f the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one . . . may rationally be drawn." 116 F.3d 876, 884 (D.C. Cir.), *vacated and reh'g en banc granted*, ___ F.3d ___, 1997 WL 569524 (D. C. Cir. Sept. 5, 1997).

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[9] *Amici* argue that, unless claimants are mechanically granted inferences of discrimination from sustainable findings of "pretext", which shift the burden onto the defendants, then claimants will be unable to prove disparate treatment cases without "smoking gun" evidence of discrimination (*Am.* Br. 7-8).

But why should that be so? What about, for example, strong circumstantial evidence of discrimination, properly prepared statistics, or contemporaneous documents that imply the use of gender-based or racially-based stereotypes? Again, the difficulties of proving any case where the issue concerns the defendant's state of mind (*e.g.*, *scienter*; intent to monopolize) do not justify mechanistic rules that confer recoveries where no valid claims exist.

We think that assertion is wrong, for the reasons noted above; but it is plainly the governing premise of the opinions in the Third, Sixth, Eleventh and D.C. Circuits. As it must be; for unless it were accepted that an employer's deliberate lie ("pretext" coupled with mendacity) could always give rise to an inference of forbidden discrimination, there could be no principled excuse for making such a finding unreviewable.[10]

Petitioner here necessarily rests on the same flawed premise; but this case, as noted above, presents no such facts. The district court's finding of "pretext" was barely sustained under a "clearly erroneous" standard (29a-30a). And not even the district court itself seemed to believe that the finding of "pretext" could alone support a conclusion of discrimination (162a, 164a-65a; *see* 31a). How the Third, Sixth, Eleventh and D.C. Circuits would react to a case such as this—one lacking mendacity as well as any creditable evidence of

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[10] To be sure, the decisions or *dictum* in these circuits also rely on another passage of the *St. Mary's* opinion—specifically:

> "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*. . . .'" (509 U.S. at 511 (emphasis and alteration in original, footnote omitted))

We believe that the words "will permit" must mean, in context, will *sometimes* permit; for, if "rejection of the defendant's proffered reasons" would *always* permit an inference of discrimination, thereby rendering a finding of discrimination unreviewable, then the subsequent passage of the opinion, that such a finding is "subject, of course, to appellate review—which should be conducted . . . under the 'clearly erroneous' standard" (*id.* at 524), would make no sense whatever.

discrimination—cannot be known with any certainty because those circuits, so far as we are aware, have not yet been presented with such a case.

4. Also as noted, the Second Circuit, after explicitly overturning virtually every district court finding on "pretext" it reviewed, as well as all others on discrimination, saw no need to continue that analysis. Under its (we submit, accurate) reading of *St. Mary's*, since "pretext" even coupled with mendacity does not render a finding of discrimination unreviewable, then surely a barely sustainable finding of "pretext" without mendacity is reviewable by the normal means under the normal standard.

As a consequence of the Second Circuit's approach, a number of the district court findings using the words "bad faith" or "dishonesty" were not expressly overturned by the court of appeals (*e.g.*, 93a). And, of course, petitioner must rely on those findings-in-limbo to bring her case within the linchpin premise of the opinions on her side of the "split". But such reliance confronts not only the appellate court's unconcealed discountenance of those findings but the record facts that so obviously refuted them.[11]

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[11] Although an employer's explanation for the failure to promote may be found to be "pretextual" even when not a deliberate lie—for "surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar" (*St Mary's*, 509 U.S. at 520)—the dictionary definition of the word "pretext" presupposes a deliberate lie (*see* 278a). It may have been for this reason or simply because of its irrelevance to the ground of the decision that Judge Calabresi's concurring opinion slipped from the fact of a sustained finding of "pretext" into the more extreme locution of "Vassar's lie" (251a-52a). In context, however, the reference appears to have been entirely hypothetical, for neither did Judge Calabresi cite any evidence

We take, as one example, the harshest district court finding, that of "purposeful dishonesty" regarding one of petitioner's National Science Foundation ("NSF") grants. According to this version, the chairman of Vassar's biology department, Dr. Mehaffey, had tricked petitioner by "deliberately ask[ing her] to remove" three letters allegedly containing "excellent NSF reviews of her work", which "clarif[ied]" earlier criticisms, while leaving in the file her own letter to NSF attaching and responding to that earlier NSF criticism of her original grant application (93a-94a).

The reality, as the record plainly demonstrates, is the extreme opposite of that rendition of the facts.

In the first place, nothing was put in, left in or taken out of this sector of petitioner's file, except as petitioner herself directed (Tr. 109, 111).[12] As was true of any tenure candidate at Vassar, petitioner had complete discretion as to the contents of this part of the department file (*id.*).

In the second place, while Dr. Mehaffey did no more than to suggest that petitioner remove the supposedly unqualifiedly "excellent" NSF letters, the suggestion, far from trickery, was the hallmark of fairness; and petitioner's best interests were obviously served by her following it. The well-based and already-formed perception of weakness in petitioner's scholarship was that it was based largely on the ideas of her

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to support such a conclusion nor does this record contain any.

[12] Vassar's departmental files regarding its professors are subdivided into a discretionary part, containing materials submitted for filing by the professor herself or himself, and a confidential part that contains salary and appraisal information (Tr. 1398-1400). It is the former part that this issue concerns.

collaborators.[13] These letters, read together, would plainly have confirmed that perception.[14]

In the third place, it was petitioner herself who decided to leave in one of those three NSF letters (written by a person who was himself one of petitioner's friends and collaborators, Pl. Exh. 62B at E436, Tr. 112) and remove the two that raised questions about her independence as a scholar (Tr. 581-83). And, in the fourth place, far from denying that she knew perfectly well that her own letter responding to enclosed earlier NSF criticism had been left in the file, petitioner's very complaint that it "had never occurred to me that there was any relevance" to that material affirmatively showed that she knew it was there (Tr. 594). As the unchallenged evidence made clear, neither she nor Dr. Mehaffey had focused on it during their discussion (Tr. 1398-1400), although she, having created this part of her file (Tr. 109), had considerably more familiarity with its contents than he did.

Moreover, the two letters that petitioner herself removed from the file in no way "clarified" or withdrew any of the

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[13] Even petitioner was then well aware of concerns within the department that her work had been principally confined to developing ideas originated by Dr. Sawyer and petitioner's sister, Dr. DeCoursey (*e.g.*, Pl. Exh. 62A at E425, Tr. 121: "I hope that my continued collaboration with Dr. Sawyer's group will not be interpreted as a lack of independence").

[14] *E.g.*, one of the supposedly unqualifiedly "excellent" NSF reviews of petitioner's grant application stated,

> "the methods for the dermal-epidermal separation are not compatible with receptor binding assays, and although she presents a possible method developed by a colleague (Dr. Sawyer), she acknowledges that the methods for *her* studies have not yet been worked out." (Pl. Exh. 62B at E435, Tr. 112, emphasis in original)

criticism of her earlier application; they simply evidenced the fact that petitioner and her collaborator had cured the problems with the original application that *NSF* had brought to their attention (Pl. Exh. 62B at E432-35, Tr. 112).

With regard to another NSF grant application, the district court castigated the Vassar biology department for supposedly having "belittled" petitioner's contribution in relation to that of her sister, Dr. DeCoursey (93a). Not only was there no such belittlement, however; the biology department gave petitioner more credit on this matter ("we appreciate that Ms. Fisher made and will continue to make a contribution to the development of [the project]", Pl. Exh. 8 at E220, Tr. 249) than did Dr. DeCoursey herself. For Dr. DeCoursey, ultimately, did not use petitioner's technique in her research, nor did Dr. DeCoursey's final paper list petitioner as an author (Tr. 1653-56).

All the district court's other findings with regard to both NSF applications are equally, conspicuously erroneous, as are each and every other finding of "bad faith" that the court of appeals felt it would "waste time" (254a n.13) expressly to review. While these are obviously factbound determinations, any notion that this record contains so much as a scintilla of evidence of "mendacity" would not survive even the scantest analysis of the pertinent facts. And absent such a tenable conclusion, this case stands, not as a vehicle for resolving the controversy that *amici* and petitioner wish addressed, but as an example of how a materially different, unchallenging issue may be resolved by standards that petitioner and *amici* themselves either espouse or accept.

II.

THE COURT OF APPEALS IN NO WAY DEPARTED FROM APPROPRIATE STANDARDS OF APPELLATE REVIEW IN OVERTURNING THE DISTRICT COURT'S FINDINGS AS CLEARLY ERRONEOUS.

Petitioner and *amici* agree on the assertion that (quoting *amici*), because "[t]here are *always* 'possible' explanations other than discrimination for why an employer has proffered a pretextual explanation" (*Am.* Br. 10) (emphasis in original), the court of appeals erred in "failing to identify the evidence in the record that rendered even one of those 'possible motivations' not just 'possible' but plausible as an alternative to petitioner's allegation of discrimination" (*id.*; Pet. 6-7).

This is the heart of petitioner's and *amici's* position; and it materially misstates the Second Circuit decision.

The burden of proof to establish unlawful discrimination was on petitioner. Petitioner did not meet that burden by advancing an "allegation". Nor did petitioner meet that burden by achieving a barely sustained finding of "pretext".

Unquestionably, the *en banc* court considered whether the rule was (or should be) that a sustainable finding of "pretext" should in *all cases* preclude review of an ultimate finding of discrimination. Whether such a rule could be justified for *all cases* depends on whether unlawful discrimination is more probable than not when the employer's "explanation" is "pretextual"—which, in turn, depends on whether in many cases there are other possibilities. It was in that context—and that context *only*—that the *en banc* court referred to the many such other "possibilities" (216a). And, given the undeniable existence of such "possibilities",[15] the court held that no

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[15] *Amici* themselves acknowledge the possibility that "cases where the inference of discrimination cannot follow from the finding of pretext are common rather than

mechanistic rule decreeing an inference of discrimination in *all "pretext" cases* made sense (218a) (following the conclusion also set forth in *St. Mary's*, 502 U.S. at 524).

The panel, which had earlier reached the same conclusion (30a-31a), then went on to hold that neither the grounds for sustaining the "pretext" finding nor any other evidence could rationally support the ultimate finding of discrimination (57a). And that ruling was made, not because of other "possibilities", but for the simple and basic reason that petitioner had failed to meet her burden of proof (57a, 60a, 66a, 70a).

There was absolutely no need, therefore, for the court of appeals to "identify evidence" of such "possibilities". Since it was petitioner, not Vassar, who had the burden of persuasion, it was the lack of creditable evidence to support her charges (*not* the existence of other "possibilities") that resulted, quite properly, in the dismissal of her case.

In short, whereas the court of appeals cited the many other "possibilities" merely as a reason why a simple finding of "pretext" does not invariably give rise to an inference of discrimination (or thus satisfy a claimant's burden of persuasion), petitioner and *amici* characterize those passages as the court's acceptance of other "possibilities" as sustaining the *defendant's* purported burden (that the court said was on the claimant) and as defeating a purported "inference" (that the court said did not arise).

There is error here, but it resides in petitioner's and *amici's* misdescription of the opinion they want, without good grounds, to have this Court review.

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exceptional" (at 9 n.1).

III.

THERE WAS NO SUSTAINED OR SUSTAINABLE FINDING OF SEX-STEREOTYPING IN THIS CASE FROM WHICH ANY ISSUE OF LAW ON THAT SUBJECT COULD ARISE, OR ANY HOLDING COULD BE REVIEWED.

Petitioner and *amici* contend that the court of appeals misperceived that sex-stereotyping may be evidence of discriminatory intent. But there was no such misperception (*see* 38a, 40a, 227a-28a); only the absence of a sustained or sustainable finding that any such stereotyping took place.

1. One source of petitioner's argument of sex-stereotyping comes from the district court's finding that "Dr. Mehaffey admitted at trial that the fact that the time plaintiff had taken off in order to raise a family was a principle [sic] factor in the Department's recommendation to deny her tenure" (168a). The district court cited that purported "admission" as "direct evidence that the Biology Department . . . was unable to overcome the stereotypical view of women as either scientist or wife—but not both" (*id.*).

The initial panel, however, overturned that finding, quoting the full text of the supposed "admission":

> Q: Did you join in the thought that her being ten years away from active involvement in biological research represented a huge gap in her knowledge that was presently relevant to her being on tenure track?
>
> A: Yes, I think I did. May I explain a little bit?
>
> Q: Certainly.
>
> A: Largely because the field moves very quickly. Any field in biology moves very quickly. And ten years of not being actively involved in the field means that you have an awful lot of catching up to do, and that's what we were

worried about here, just that there's an enormous amount of work to catch up. (41a, *quoting* Tr. 1906).

On the one hand, therefore, Dr. Mehaffey's testimony was clearly to the effect that the gap in petitioner's studies (a gap the department report itself identified as nine years, Pl. Exh. 8 at E217, Tr. 249) was "relevant" to the tenure decision in the sense of posing a question as to whether petitioner had caught up on developments in the field (a question the department basically answered in her favor, as other evidence showed, *e.g.*, Pl. Exh. 8 at E221, Tr. 249). The district court, on the other hand, concluded that Dr. Mehaffey had "*admitted*" that this gap was a "*principle* [sic] factor in the department's recommendation to deny her tenure" (168a, emphasis added). Being "relevant" as giving rise to a question is a far cry from being the "principal" reason for a decision.

In other words, that finding was flat-out disproved by all the evidence pertinent to it, which was why it was reversed; and no inference of sex-stereotyping or anything else can be drawn from such manifest error.[16]

2. The district court further referred to what it described as the "persistent fixation of the Biology Department's senior faculty on a married woman's pre-Vassar family choices" which, in the district court's view, also "reflect[ed] the acceptance of a stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist" (128a).

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[16] Also, obviously, to compare the treatment accorded married and unmarried women (as the district court did in this as well as many other findings) is to determine whether discrimination has been engaged in on the basis of marriage, which is not actionable under Title VII, or any other statute relied on in this case. The point was made by the panel opinion (54a-55a) and by Judge Jacobs's concurrence (236a).

Not only, however, was there no such negative "fixation", but there was conclusive evidence to the contrary.

Initially it should be noted that it was petitioner herself who often called attention to what she referred to as her "ten year" (Pl. Exh. 62A at E425, Tr. 121) or even eleven year absence from the field (Tr. 735); for she was proud of the effort she had made after that hiatus to bring herself into familiarity with the developments that had occurred during that period. And in fact, she received full credit by the biology department report for having done so (*e.g.*, "we believe that this record represents significant scholarly acomplishment [sic]", Pl. Exh. 8 at E218, Tr. 249). The only reference made in the department report to her temporary absence from the field was in the initial summary of her *curriculum vitae* where it was stated that

> "She devoted, by her own report, nine years (1965-1974) entirely to her family and to her personal life." (Pl. Exh. 8 at E217, Tr. 249)

Hardly a "fixation" on Vassar's part, much less a "persistent" one; indeed, this was nothing more than a passing notation of a point that petitioner herself had brought up.

More importantly, however, the "sex-stereotyping" that the biology department was accused of entertaining as a consequence of the illusory "fixation"—"that a married woman . . . cannot be a productive scientist" (128a)—was belied on the face of the very department report that allegedly endorsed it. In the clearest possible terms, the biology department report repeatedly praised petitioner for being "productive" (Pl. Exh. 8 at E221, Tr. 249), for "a high level of energy and dedication" (*id.* at E218) and for putting "an immense amount of energy into establishing herself as a research scientist" (*id.* at E221). The department found fault with the *quality* of Fisher's work and with her decisions as to which work to pursue, but never with the amount of it.

3. Petitioner likes (and therefore emphasizes in her petition) the passing reference in Judge Calabresi's concurrence to Vassar having "incorrectly claimed" that petitioner "did not spend enough time in the lab" as *possibly* derived "from a discriminatory stereotype" (251a). While that characterization of the biology department report enabled the posing of the "interesting question" that Judge Calabresi went on to discuss (252a n.12), it cannot be substantiated on the face of the report itself.

The report, after noting the "intermittent brief periods during which [petitioner] was actually engaged in laboratory work", specified exactly what those periods were and gave her credit for every day of them (Pl. Exh. 8 at E221, Tr. 249).[17] But again, the self-evident point of this section of the report was not the *amount* of time she spent in the laboratory; it was the fact that, instead of concentrating in-depth on the area that was supposed to have been her major research subject, she had dispersed her energies into four different laboratory projects and a variety of other activities (Pl. Exh. 8 at E221, Tr. 249). This lack of a sustained in-depth probing of her "research problem" legitimately gave rise to questions "about her commitment" (*id.*)—exactly the sort of judgment that Judge Calabresi quite properly advocated (in the context of the rating of scholarly journals) should be left to the college as a matter of academic freedom (254a n.13).

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[17] Specifically: "[petitioner] was actually engaged in laboratory work: July and August, 1983 in Sawyer's laboratory, one week in February in Mary Tyler's laboratory and a little more than two months in summer, 1984 in Sengel's laboratory in Grenoble, and the months of January, April, and May 1984 at Vassar." (Pl. Exh. 8 at E221, Tr. 249)

As opposed to that particularized 7 1/2-to-eight-month period, petitioner conclusorily asserted nine months, which the district court chose to believe (98a).

The "question" that Judge Calabresi found "interesting"—and which petitioner and *amici* urge this Court to consider—is whether any given sex-stereotype, plausible in the abstract although never shown to have been entertained by the defendant (here, the argument goes, that "*married* women with children spend less time in labs than *unmarried* women with children") should lend "more weight" to the sort of "error" Vassar allegedly made (in supposedly claiming that petitioner "did not spend enough time in the lab", 251a) because the stereotype and error are "linked" (252a n.12, emphasis in original).

This case, however, presents no such question. Not only did petitioner fail to show that Vassar was in the grip of this alleged stereotype; the evidence categorically demonstrated the opposite. And not only did petitioner fail to prove that Vassar had made any material misstatement regarding her time in the lab; the biology department's particularization of that time differed inappreciably from petitioner's own disparate conclusory assertions on the subject. Moreover, the "stereotyping" that the "interesting question" concerns is marriage-stereotyping, not sex-stereotyping; so that the "question" itself not only fails to pertain to the facts of this case, it is not even "linked" to any statute yet enacted.

In sum, there is no question but that sex-stereotyping, where it occurs, is relevant to discrimination; but there should be equally no question that it should not be assumed to occur when there is no evidence of its occurrence. In this field of law, it is understandably tempting to exponents of either side of the philosophical debate to restate the facts of a given case so that they fit the mold of an "interesting question". But where the actual facts do not properly support such characterizations, rendering rulings on the consequently hypothetical record would both injure parties to the litigation and do disservice to the development of the law.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

October 9, 1997

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CYNTHIA J. FISHER,

Petitioner,

—v.—

VASSAR COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF

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REPLY TO RESPONDENT'S BRIEF

Respondent's Counterstatement of the Question reviewed, would relieve this Court of any further need to consider the case because, of course, no one denies that an appellate court has the power to review for clear error even a finding of liablity under Title VII and/or ADEA that is supported by facts giving rise to a prima facie case and a sustained finding of pretext. Instead of this non-issue, the vital questions raised squarely by this case are those stated in Petitioner's request for the writ of certiorari and restated briefly below.

Respondent concedes that a split in the circuits exists concerning the application of the *St. Mary's* standard to a case where a suggestion of the employer's mendacity undergirds the sustained finding of pretext, but seeks to obscure that clear legal issue by arguing that it is not presented here because "one cannot identify any facts in this record to support any finding of 'mendacity.'" (Resp. Br.. p.3) On the contrary, as shown below, the district court made ample findings of the employer's mendacity which were left undisturbed by the reviewing panel. This case is an appropriate vehicle for this Court to provide much-needed instruction to the lower courts concerning the legal issues presented here.

Preliminary Statement

Petitioner has urged three interrelated issues, all of which are significant beyond the facts of this case.

The first question asks this Court to resolve a conflict among the circuits concerning how much and what kind of evidence, in addition to the showing of a prima facie case

and a finding of pretext, is required to sustain a finding of discrimination . On this point Respondent seeks to portray Petitioner's position as an extreme one. Respondent argues:

> "The stated rationale of the passages that petitioner cites...is that (1) a natural and logical inference of unlawful discriminaton can *always* be drawn from an employer's explanation that is proven to be mendacious, so that (2) a district court's sustainable finding of 'pretext' based on such mendacity must *always* render unreviewable its ultimate finding of unlawful discrimination." (Resp. Br. p. 2)

Petitioner made no such extreme argument, nor did the dissenters in the in banc court do so. Rather, Petitioner and the amici have urged, as this Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity), may, together with the elements of the prima facie case, suffice to show intentional discrimination." 509 U.S. at 511.

Second, this case raises the question whether an appellate court, on the principles underlying Federal Rule of Civil Procedure 52 (a) may reverse a trial court's finding without clear supportable reasoning, based on a detailed review of the facts or marshalling the evidence on which to base such reversal.

Third, this case presents a telling instance of the way in which a discriminatory sex-stereotype may injure women protected by federal discrimination law. That issue is seminal to this case and its disregard has fueled the reasoning of the court below on the other two issues. Petitioner asserted that

the discrimination imposed on her concerned her status as a married woman in academia in the hard sciences. The court below found that Vassar considered it a negative significant factor that the plaintiff, a married woman, had taken off a period of at least eight years away from her career in science to be with her family before returning to academia where she distinguished herself as teacher and research scientist. The court below specifically conceded that the "evidence supports an inference that Fisher's eight year absence from academia hurt her chance for tenure." (57a) The court nonetheless declared that there was nothing improper for Vassar to rely on that "hiatus" in Fisher's career as a negative disqualifying factor, that it was not a discriminatory sex-stereotype, despite the clearly reasoned opinion of the district court holding it to be so.

The Counterstatement of the Case

Respondent claims that the district court's judgment was reversed "because the discrimination finding could not be sustained by *any* (sic) evidence of record, or by any inferences tenably arising from such evidence..."(Resp. Br. p.2) As Petitioner pointed out, Chief Judge Newman dissenting in the court below, stated that the panel decision "did not even purport to deem deficient the evidence underlying either the plaintiff's prima facie case of discrimination against married women or the finding of pretext. Not one of the District Court's 111 subsidiary findings of fact was ruled unsupported by the evidence." (289a, 290a) Instead, the court below reversed the liability judgment against Vassar "because our conviction that a mistake has been committed is definite and firm." (7a).

Petitioner does not argue that a decision of a district court cannot be reviewed under the "clearly erroneous"

standard of FRCP 52(a). Petitioner and the amici do contend, however, that the reviewing court is bound by other rules and standards and may not reverse a district court which has appropriately ruled on the evidence before it and the inferences to be drawn from that evidence simply because it would have decided the case another way. See *Anderson v. City of Bessemer City* ,470 U.S. 564. 573-574 (1985).

Since Respondent has placed so much weight on the supposed absence of any factual support in the record for a suspicion of mendacity, Petitioner welcomes the opportunity to cite findings of fact by the district court pertinent to Vassar's mendacity and to its ruling that Vassar intended, by its mendacity, to hide illegal discrimination involving a sex-based sterotype against married women in the hard sciences. In urging this thesis and its non-question upon this Court, Respondent arrogates the role of fact-finder and undertakes to review the facts of this case as the court below failed in its obligation to do.

1. As to her publications, the court found "the Department's conclusions ...and other comments...about her published work were disingenuous, pretextual and clearly made in bad faith." [1]

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[1] Judge Calabrisi, dissenting, has an extensive footnote on the district court's ruling on the relative importance of scientific journals which underlines his own admitted ignorance of the significance of the Science Citation Index (SCI). (354a,note 13) He said"What are first class reviews is not for the district court to determine." Evidence adduced at the trial concerning SCI established the importance of SCI (80a,81a)and Petitioner's track record in the highest rated journals which compared her favorably to other tenured faculty. As further authority , "No Nobel Prize This Year? Try Footnote Counting, " *New York Times*, Oct. 7, 1997, p.F4, See also Steven

2. The committee incorrectly stated that one of her grants was secured only after five unsuccessful attempts." (91a)

3. "...The Department's inference that co-principal investigator (a title petitioner held on an awarded grant of over $200,000) is less important is 'not at all' true." (93a)

4. " The Court finds the Committee's quotation of language from the Poodry letter and the attached reviews in its recommendation to be purposeful dishonesty." (93a)[2]

5. Re. Criticism of Petitioner's presentation at a research colloquium: "This was a spurious criticism since her colloquium involved a review of the techniques she invoked to secure her grant proposal." (94a)

6. Re Petitioner's sabbatical leave activities: "This statement stands out starkly as another demonstration of

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Weinberg *Dreams of a Final Theory* p. 121 where he placed his ratings in SCI above his Nobel prize.

2 Respondent, aware that the finding of purposeful dishonesty" is synonymous with "mendacity" tries to explain away the district court's finding. Respondent offers a skewed explanation which ignored the significance of the deceit. (Resp. Br. pp.20-23) Because the successful letters showing the award of the grant were removed from petitioner's tenure file at the Chairman's suggestion, all that was left in the file for review was the record of the granting agency's characterization of petitioner's unsuccessful grant applications, assessed as "fair to good," not "very good to excellent." The Department in its recommendation letter, relying on these rejected grant applications, characterized her successful grant applications as graded only "fair to good" to show falsely that petitioner was not highly regarded by the granting agency. (See Exhs. 8, 62A, Tr. 286-290

the Department's bad faith since Dr. Fisher's scholarship was superior or at least equal to the scholarship of the three men and single woman who preceded her in achieving tenure as well as the man who subsequently achieved tenure." (99a)

7. "Based on the foregoing testimony and evidence, the court finds that these conclusions concerning Dr. Fisher's scholarship were made in bad faith, were pretextual, and represented the application of patently discriminatory standards." (103a)

8. "[D]espite Dr. Fisher's impressive record which was superior or equal to the scholarship of the three men and single woman) who received tenure between 1979 and 1985 and the one man who received tenure in 1987, conclusion,that her overall scholarship accomplishments were 'mixed'..They credited her with 'energy,' but questioned her 'independence' as a scholar and the 'depth of the mastery of the field in which she was working.'...Based on the foregoing testimony and evidence, the court finds that these conclusions concerning Dr. Fisher were made in bad faith, were pretextual and represented the application of patently discriminatory standards."(109)

9. .. Re teaching: The Committee distorted the numbers by counting only fives for Dr. Fisher while counting fours and fives for the other candidates to determine student evaluation rankings. Additionally, the Committee emphasized a few critical comments about Dr. Fisher's teaching instead of noting the genrally affirmative comments that were made by the student committees." (111a)

10. Re the development of a 300 level course, "This was false both as to Dr. Fisher and as a standard applied to other tenure candidates. (120a) "It is additionally significant that early evaluation by the Department of Dr. Fisher's service to the College and the Department were glowing. (Exh. 5G,5N) The only explanation for the change in attitude towards Dr. Fisher that the court can find is the discrimination manifested in its decisions concerning her culminating in its decision not to promote her. "(121a)

11."The Biology Department, in its negative tenure recommendation, minimized the importance of Dr. Fisher's many grant successes...The departmental letter even criticised Dr. Fisher's funded grant applications implying that the expert peer reviewers for these highly competitive national awards were somehow remiss in failing to spot the defects in her work which the Vassar Biology Department was able to discover...Research grants are awarded by the NIH and NSF under extremely competitive circumstances and only after intensive review by a panel of expert peers in the scientific discipline of the person submitting the grant..These criticisms were in sharp contrast to the recommendations made concerning the three male candidates who had been granted tenure while Dr. Fisher was on the faculty." (92a)

The Unrecognized but Determinative Sex Sterotype Against Married Women in the Hard Sciences

Petitioner was sex-stereotyped because she had taken out at least eight years of her career to be with her husband and children before Vassar hired her and which hiatus had ended eleven years before her tenure review.

The sex stereotype which evaded the understanding of the court below and to which Respondent proves equally

blind has plain statement in the record in findings by the district court. Said that court:

> "...[C]omments on the pre-Vassar personal life and life choices were not made in any letters of evaluation of other faculty. The Biology Department...focused on this 'hiatus' aspect of Dr. Fisher's life choices regarding familty priorities when the Committee made its in-person presentation to the FASC Committee on May 3, 1985, regarding its reasons for rejecting Dr. Fisher's candidacy. At that meeting the Department represented to the FASC Committee that Dr. Fisher was 'out of date—out of the field for 10 years.'...The reference to being 'out-of- date implied that Dr. Fisher's scholarship was obsolete as a direct result of the period she was at home with her husband and children." (127a)

On that issue, the original panel decision, left untouched by the in banc court, makes clear that, at least in the Second Circuit what is called the "mommy track is the law. Married women who take time out of their careers for family may be permanently stigmatized in the employment scene. An employer may use that 'hiatus' for for unfavorable later review even if the time out was before the employment in question, and even if the employee has out-performed her cohorts on the job. If the employer says this is the reason for an unfavorable review, no court may hold the reason sex-based or stereotypical. The panel dccision, upheld, but not reviewed by the in banc court stated:

> "In making tenure decisions, it is perfectly reasonable to consider as a factor the candidate's prolonged absence from academia in making hiring and

promotion decisions. The law does not prevent employers from considering such things.

" A policy may discriminate between those employees who take off long periods of time in order to raise children and those who either do not have children or are able to raise them without an appreciable career interruption. That is not inherently sex specific and does not give rise to a claim under Title VII" (58a, 59a)

The district court finding of sex stereotyping, rejected completely by the decision in this case, is inconsistent with holdings of this Court as set forth in the Petition and should not be the law of the land. (Pet. Br. pp. 17-23). The failure of the court below to recognize this stereotyping and the prejudice against married women in science, historically and at Vassar for its entire history up until the Fisher case, demonstrates how accepted is the stereotype. [3]

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3 Much is made by Respondent of the reference by the Court below to the statistics showing that no married woman in the hard sciences had ever been tenured at Vassar in the whole history of Vassar. The Dean of the College admitted this fact (132a) (except for psychology—only one (Resp. Br. p.8) It is further inexplicable how Respondent can urge in support of its position the fact that other married women in the hard sciences attained tenure *after* Petitioner had brought this law suit. Respondent, although caviling with Petitioner's statistical model, could nonetheless point to no such married woman on Vassar's faculty in the hard sciences prior to Petitioner's complaint.

Further, as to whether psypchology is a hard science (Resp. Br. p. 8,9,) Petitioner submitted evidence, accepted by the district court that in 1985, psychology was categorized by the National Academy of Sciences as a "social science." (Exh. 84a, 126a)

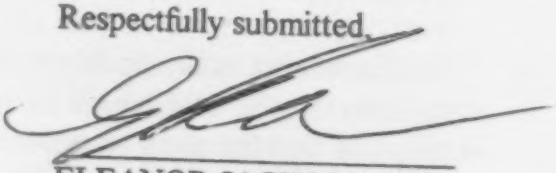
In summary, it is clear that even in Respondent's denials, and certainly in the careful and lengthy arguments of the five dissenting judges of the Second Circuit, that this case raises issues of significant importance to federal jurisprudence in discrimination law.

CONCLUSION

For the reasons stated in the Petition, as augmented here, this Court should grant the Petition for Certiorari.

October 20, 1997

Respectfully submitted,



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